SUPREME COURT, U.S.
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No. 06-__

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the New Hampshire business profits tax regime facially discriminate against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the State, a restriction virtually identical to restrictions struck down by this Court in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and by state courts of North Dakota and California?

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. In the Superior Court of Merrimack County, New Hampshire, the respondents were Stanley R. Arnold, Commissioner of New Hampshire Department of Revenue Administration and the New Hampshire Department of Revenue Administration.

RULE 29.6 STATEMENT

Petitioner has no parent corporation. There is no publicly held company that owns 10% or more of petitioner's stock.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

General Electric Company respectfully petitions this Court to grant a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (App. 1a-21a) is reported at 914 A.2d 246. The orders of the Superior Court of Merrimack County, New Hampshire (App. 22a-43a; App. 44a-49a) are not officially reported.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on December 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the New Hampshire statutes are set forth at App. 65a-72a.

STATEMENT

This case raises in the context of foreign commerce an issue that this Court and other state courts have previously addressed in the context of interstate commerce. The New Hampshire income tax regime at issue here grants a dividends received deduction to corporate shareholders of foreign corporations only to the extent the underlying corporation engages in in-state business activity. In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court held that a state intangibles tax regime granting a tax base deduction to corporate shareholders only to the extent the underlying corporation engaged in in-state business activity "facially discriminates against interstate commerce." *Id.* at 333. *Fulton* thus compels the conclusion that the New Hampshire regime impermissibly discriminates against foreign commerce. Moreover, every state court evaluating other States' tax regimes with deductions virtually identical to New Hampshire's, although applied with respect to domestic subsidiaries, has concluded that such regimes facially discriminate against interstate commerce.[1] The court below, however,

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[1] See *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004); *Ceridian Corp. v. Franchise Tax Bd.*, 102

viewed *Fulton* as "not analogous" (App. 20a) and simply did "not agree with [the] analysis" of the state courts that relied on *Fulton* in striking down admittedly "similar" regimes. App. 21a.

This case also raises a second issue that this Court has previously addressed in the context of interstate commerce. In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), this Court condemned a state tax regime granting a tax benefit for an interstate transaction with local attributes over a comparable interstate transaction without local attributes, because the regime "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335. The New Hampshire tax regime under consideration here likewise grants a tax benefit for foreign dividends with local attributes over comparable foreign dividends without local attributes. *Boston Stock Exchange* thus compels the conclusion that the New Hampshire regime impermissibly discriminates between two types of foreign transactions to favor local commercial interests over out-of-state business. The court below, however, while citing *Boston Stock Exchange* (App. 18a-19a), sustained the State's tax regime without explaining how its result can be squared with the rule of that case.

Simply put, the decision below resolves under the "foreign" Commerce Clause an issue this Court and other state courts have previously resolved differently under the "interstate" Commerce Clause.[2] In so doing, the court below has precipitated a conflict with several other state court decisions, as well as with decisions of this Court.

Cal. Rptr. 2d 611 (Cal. App. 2000); *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003).

[2] If the commerce under consideration in these cases had been foreign rather than interstate, the taxing statutes at issue would have raised "foreign" rather than "interstate" Commerce Clause questions.

1. New Hampshire's Taxing Regime (1990-1999)

During the tax years at issue, New Hampshire imposed a business profits tax (BPT) at the rate of between 7 and 8 percent on the "taxable business profits" of every business organization. N.H. Rev. Stat. Ann. § 77-A:2. "Taxable business profits" is essentially federal taxable income, as modified by specified state adjustments and apportioned to the State. *Id.* § 77-A:1, III and IV. Although each taxable business organization ordinarily reports its own income on a separate basis, when a group of commonly controlled corporations engages in a unitary business, *i.e.*, a business characterized by economic interdependence, *id.* § 77-A:1, XIV, the unitary group reports its income to New Hampshire on the basis of combined reporting. *Id.* 77-A:1, XIII, XV, XVI. Under combined reporting, the income of the unitary group members is combined on a single return; intercompany transactions among group members (such as payment of dividends) are eliminated (*i.e.*, disregarded); and the resulting income is apportioned to New Hampshire by a formula reflecting the ratio of the group's property, payroll, and sales within the State to the group's property, payroll, and sales wherever located. *Id.* § 77-A:1, XVI, 77-A:3, 77-A:6, IV.

New Hampshire's combined reporting method does not apply to every member of the unitary group. If a unitary foreign corporation has 80 percent or more of the average of its payroll and property outside the United States, the corporation (hereinafter a "foreign subsidiary"[3]) is excluded from the combined report.[4] Instead, New Hampshire taxes such

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[3] This is consistent with the usage throughout this litigation, although the statute denominates such corporations as Overseas Business Organizations. N.H. Rev. Stat. Ann. § 77-A:1, XIX.

[4] For this reason, the statute describes the unitary group that actually files on a combined basis in New Hampshire as the "water's edge combined group," N.H. Rev. Stat. Ann. § 77-A:1, XV, because the group stops at the water's edge insofar as foreign subsidiaries are concerned.

foreign subsidiaries under a "separate company" reporting method. Under the separate company reporting method, any foreign subsidiary that does business in New Hampshire files a separate return computing its own income properly apportioned to the State. Such income is subject to the BPT independently of the BPT imposed on the income of the combined group. If a foreign subsidiary does no business in New Hampshire, it does not file a separate return there.

If any foreign subsidiary pays a dividend to a member of the New Hampshire combined group, the foreign dividend payment is treated as a separate stream of taxable income to the group. N.H. Rev. Stat. Ann. § 77-A:3, II. Such separate treatment differs from the treatment of dividends paid by members of the combined group to one another. Those intragroup dividends are disregarded and eliminated from the group's income as intercompany items. The foreign dividends, by contrast, are separately apportioned to New Hampshire, and the apportioned amount is added to the group's combined income to determine the group's total income subject to the BPT.[5]

Finally, and for purposes of this case most importantly, if a foreign subsidiary pays a dividend to a member of the combined group *and the foreign subsidiary is engaged in business generating taxable income in New Hampshire*, the group's income (including the dividend) subject to the BPT is reduced by a dividends-received deduction (DRD) equal to the amount of taxable income the foreign subsidiary reported in New Hampshire on its separate return. N.H. Rev. Stat. Ann. § 77-A:4, IV; App. 10a-11a. By contrast, if the foreign subsidiary pays a dividend to a member of the combined group *and the*

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[5] This separate category of income is described as "New Hampshire foreign dividends taxable business profits." App. 4a. The dividends are apportioned under the unitary group's formula, as modified to reflect the foreign subsidiary's non-New Hampshire apportionment factors. N.H. Rev. Stat. Ann. § 77-A:3, II(b).

*foreign subsidiary is **not** engaged in business in New Hampshire*, the group's income (including the dividend) subject to the BPT is fully taxed and no DRD is allowed.

2. Facts

As the court below explicitly recognized, "[t]he facts are not disputed by the parties." App. 9a; see also App. 6a (referring to "undisputed facts") and 21a.

a. GE and its Affiliates

General Electric Company (GE or petitioner) is a New York corporation with its principal offices in Connecticut. During the tax years at issue (1990-99), GE carried on extensive business activities throughout the United States, including New Hampshire. In addition to carrying on its own activities, GE was the common parent of numerous affiliated corporations, domestic and foreign, that carried on a wide range of business operations within and without the United States, including manufacturing, finance, broadcasting, and insurance. During each of the tax years, a portion of GE's business operations was conducted by foreign affiliates that did no business in New Hampshire or in any other State.

b. Taxation of GE and its Affiliates

Because it conducted business within New Hampshire, GE was required to file a New Hampshire BPT return and pay a BPT for each of the tax years at issue. In determining GE's BPT liability for the each of the tax years, GE and respondent agreed for purposes of this case only that GE and its affiliates should be treated as engaged in a "unitary business" within the meaning of the BPT statute, and that GE and its domestic unitary affiliates should be treated as one combined group (the "domestic combined group"). Accordingly, the income of the group members was combined, intercompany transactions (such as payment of domestic dividends) were eliminated, and the resulting income was apportioned to New

Hampshire by the three-factor formula reflecting the New Hampshire portion of the group's property, payroll, and sales.

Pursuant to New Hampshire's BPT statute, GE's foreign subsidiaries were excluded from the domestic combined group.[6] Under New Hampshire's regime, those foreign subsidiaries were each treated on a separate company basis, both with respect to their own BPT obligations and with respect to transactions with members of GE's domestic combined group. Because GE's foreign subsidiaries did no business in New Hampshire, they did not file their own BPT tax returns.

During each of the tax years at issue, certain of GE's foreign subsidiaries paid dividends to GE and other members of the domestic combined group (the "foreign dividends"). These dividends, as apportioned to New Hampshire, were added to the domestic combined group's income to determine the group's total BPT liability. Because GE's foreign subsidiaries did no business in New Hampshire, the statute denied GE's domestic combined group any DRD with respect to such dividends.

3. The Refund Claim

Respondent audited GE's BPT returns for the tax years at issue. Throughout the audit, GE consistently contended that allowing a DRD when a dividend-paying foreign subsidiary conducts business in New Hampshire, but denying a DRD with respect to its dividend-paying foreign subsidiaries because they conducted no business in the State, facially discriminated against foreign commerce in violation of the Commerce Clause. Respondent rejected GE's contention, but executed two settlement agreements with GE preserving this constitutional issue for appeal. The parties agreed that "GE would receive a refund of approximately $3.15 million should the foreign dividend deduction issue be resolved in GE's

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[6] See pp. 4-5.

favor." App. 2a. GE filed a timely request for a refund based on its constitutional claim, which respondent's hearing officer denied because he lacked power to decide whether the state statute violates the federal Constitution.

4. The Proceedings Below

GE timely appealed to the New Hampshire Superior Court. GE claimed, among other things, that the New Hampshire statute should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause. The court ruled against GE on the merits.

GE appealed to the New Hampshire Supreme Court. After disposing of preliminary state law issues that are no longer in dispute, that court turned to the "central issue in this case," (App. 12a), whether the DRD "facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire." App. 12a.

Rather than addressing GE's straightforward comparison between dividends received from (a) foreign subsidiaries doing business in the State and (b) foreign subsidiaries not doing business in the State, the New Hampshire court instead characterized the issue before it as one involving an examination of the State's "taxing regime as a whole" (App. 17a) and "the aggregate tax assessed against the unitary business in New Hampshire." App 21a. Under this approach, the court was able to reject GE's claim of discrimination because the "aggregate" BPT on the foreign subsidiary itself *and* on the dividends it paid to the combined group would be greater (even with the DRD) when the subsidiary conducted business and generated taxable income in the State than when it did not conduct business in the State.

The difference between the two approaches may be illustrated as follows:

GE's Comparison		
BPT paid by combined group on dividends received from foreign subsidiary **not** doing income-generating business in New Hampshire	v.	BPT paid by combined group on dividends received from foreign subsidiary doing income-generating business in New Hampshire
New Hampshire Supreme Court's Comparison		
BPT paid by foreign subsidiary **not** doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary	v.	BPT paid by foreign subsidiary doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary

As support for its "aggregate" approach, the New Hampshire court relied heavily on a footnote in this Court's decision in *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). *Kraft* involved Iowa's separate company reporting regime applicable to all corporations doing business in that State. In *Kraft*, this Court struck down as facially discriminatory the DRD that Iowa provided for dividends received from domestic subsidiaries, but not for dividends received from foreign subsidiaries. In the course of its opinion, this Court in footnote 23 addressed the proper basis for determining whether there was impermissible discrimination:

> If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary

> doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

Kraft, 505 U.S. at 80 n.23 (citation omitted).

Based on footnote 23, the court below proceeded to "assess New Hampshire's taxing regime as a whole and look at the aggregate tax imposed upon a unitary business." App. 17a. Using this approach, the court found "no improper discriminatory treatment." *Id.* As the court saw it, taxing a foreign subsidiary doing business in New Hampshire on its own business profits, and permitting a DRD for any dividends paid by that subsidiary, up to the amount of its business profits that were separately taxed, ensured that "the income of the business entity is taxed only once." App. 18a. By contrast, because a foreign subsidiary that conducts no business in New Hampshire pays no tax on its business profits, its apportioned dividends are properly taxable without a DRD "because that dividend income has been taxed only once." *Id.*

The court acknowledged that several other state courts have reached a contrary result with respect to domestic subsidiary DRDs limited in the same manner as New Hamp-

shire's. It stated simply that "we do not agree with their analysis." App. 21a. The court also gave limited attention to this Court's decision in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996). In the court's eyes, the critical difference between the two cases was that the state tax regime in *Fulton* "taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" (App. 20a), whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." App. 20a (emphasis in original).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two compelling reasons. First, the decision below has created a clear conflict with the decision of another state court of last resort, and with the decisions of other state courts as well, over the important federal question whether a State may limit deductions for dividends received to those received from corporations doing business in the State. Second, the decision below cannot be reconciled with two decisions of this Court—*Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977)—that found tax regimes to be unconstitutionally discriminatory under the interstate Commerce Clause for reasons that apply with even greater force to New Hampshire's tax regime under the foreign Commerce Clause.

I. THE DECISION BELOW CREATES A CLEAR CONFLICT BETWEEN DECISIONS OF STATE COURTS OF LAST RESORT

In upholding a DRD limited to dividends received from corporations doing business and generating taxable income in the State, the New Hampshire Supreme Court has created a clear conflict with the decision of another state court of last resort on an important federal question. In *D.D.I., Inc. v.*

State ex rel. Clayburgh, 657 N.W.2d 228 (N.D. 2003), the North Dakota Supreme Court struck down as unconstitutionally discriminatory a DRD that in all essential respects was identical to New Hampshire's. North Dakota provided a DRD equal to the amount of "the dividend payor's income . . . subject to North Dakota corporate income tax," *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire provides a DRD equal to "the amount of business profits already taxed by the state." App. 11a. North Dakota denied a DRD for dividends received from corporations doing no business in North Dakota, *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire denies a DRD for dividends received from foreign corporations doing no business in New Hampshire. The North Dakota court concluded that a DRD linked to the in-state of activity of the dividend payor "impermissibly discriminates against interstate commerce," *D.D.I.*, 657 N.W.2d at 235. The New Hampshire court "found no improper discriminatory treatment" in an identical DRD. App. 17a. It would be difficult to find a starker conflict between decisions of state courts of last resort.

The decision below is also in conflict with a series of California Court of Appeal decisions that have invalidated DRDs virtually identical to New Hampshire's. Thus, in *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004), the court found that California's DRD "is discriminatory on its face because it affords to taxpayers a deduction for dividends received from corporations subject to tax in California, while no deduction is afforded for dividends received from corporations not subject to tax in California." *Id.* at 398. Accord, *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Cal. App. 2000).

The court below half-heartedly sought to distinguish the North Dakota and California decisions by conjecturing that "it may be that in those cases, there was no taxing symmetry as there is here." App. 21a. The court's imagined distinction lacks any foundation in fact. Precisely the same "symmetry" existed in the North Dakota and California cases, namely, the income in question was taxed only once, either to the parent (in the form of dividends) or to the taxable subsidiary. Indeed, this was precisely the basis on which the taxing authorities in those cases sought to defend the taxes. *See, e.g., D.D.I.*, 657 N.W.2d at 233 ("The [dividends received deduction] insures that, in the end, there is only one level of North Dakota income tax on North Dakota income"); *Farmer Bros.*, 134 Cal. Rptr. 2d at 396-97 ("The purpose of [the statute] is to prevent the imposition of a second tax upon the stream of income leading to the dividend") (internal quotation marks omitted). Both the North Dakota and California courts roundly rejected the "taxing symmetry" justification.

More candidly, the court below recognized that its decision was creating a conflict with the decisions of other state courts. Regardless of any purported factual basis for distinguishing the decisions of the other state courts, the court below declared flatly that "we do not agree with their analysis." App. 21a.

In short, the decision below has precipitated a clear and irreconcilable conflict with another state court of last resort and with other important state courts as well. This Court should grant certiorari to resolve the conflict on this significant issue.

II. THE DECISION BELOW CONFLICTS WITH SETTLED DECISIONS OF THIS COURT

The decision below is incompatible with two decisions of this Court.

A. *Fulton Corp.* v. *Faulkner*

In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court considered a North Carolina intangible property tax as applied to taxpayers who owned corporate stock. The tax was imposed at the rate of 0.25 percent of the fair market value of the stock. The value of the stock assessed under the tax, however, was reduced by a deduction equal to the percentage of the corporation's income subject to tax in North Carolina. Under this regime, the stock of a corporation doing all of its business in North Carolina would be subject to no intangible tax; the stock of a corporation doing 50 percent of its business in North Carolina, would be subject to tax on 50 percent of the stock's value; and the stock of a corporation doing none of its business in North Carolina would be subject to tax on 100 percent of its value. This Court had no hesitation in branding North Carolina's taxing scheme as "facially discriminatory" (*id.* at 333):

> A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.

Id.

New Hampshire's DRD suffers from the same constitutional infirmity that afflicted the North Carolina taxing regime. Just as North Carolina's regime facially discriminated against interstate commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engaged in in-state business activity, so New Hampshire's tax regime facially discriminates against foreign commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engages in in-state business activity. In both cases, the regime favors corporations engaging in local activity over their out-of-state

competitors and tends to discourage corporations from plying their trades in protected commerce, whether interstate or foreign.

The fact that New Hampshire's regime facially discriminates against foreign commerce whereas North Carolina's regime discriminated against interstate commerce provides no basis for distinguishing the New Hampshire DRD under the Commerce Clause. This Court has made it clear that the protection afforded by the dormant Commerce Clause to foreign commerce "is broader than the protection afforded to interstate commerce," *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992). *See also Japan Line, Ltd., et al.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). Hence, there is an even more compelling Commerce Clause objection to New Hampshire's taxing scheme than to North Carolina's.

The court below claimed that *Fulton* was "not analogous to the present case" (App. 20a) because in *Fulton* "the state taxing regime taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" *id.*, whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." *Id.* (emphasis in original). But the court did not explain why discrimination in favor of in-state activity under an income tax is any more tolerable under the Commerce Clause than discrimination in favor of in-state activity under an intangible property tax. Indeed, the state courts that have uniformly invalidated DRDs similar to New Hampshire's have found this Court's analysis in *Fulton* controlling. *See D.D.I.*, 657 N.W.2d at 231-32 (discussing and applying *Fulton*); *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d at 57 (same), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros.*, 134 Cal. Rptr. 2d at 318 (same); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d at 619 (same).

B. *Boston Stock Exchange* v. *State Tax Commission*

The decision below is also inconsistent with this Court's decision in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). There, this Court considered a New York stock transfer tax scheme that provided, *inter alia*, a reduced tax on certain stock transfers by nonresidents through New York transfer agents when the stock sale was effected on a New York-based stock exchange rather than on an out-of-state exchange. This Court held the scheme violated the Commerce Clause because it granted a tax benefit for an interstate transaction with local attributes but not for a comparable interstate transaction without local attributes. The taxing scheme was objectionable because it "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335.

New Hampshire's DRD contains the same constitutional flaw as New York's stock transfer tax regime. Just as New York's regime favored local commercial interests by reducing the tax on interstate stock transfers with a local flavor, so New Hampshire favors local commercial interests by reducing the tax on foreign dividend payments with a local flavor. If New York may not reduce its tax on interstate commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable stock transfer be the product of a New York sale), surely New Hampshire may not reduce its tax on foreign commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable dividend emanate from a New Hampshire-taxpaying foreign subsidiary). As with *Fulton*, the fact that the New Hampshire regime discriminates against foreign commerce whereas New York's regime discriminated against interstate commerce only strengthens the force of the Commerce Clause objection to New Hampshire's taxing scheme vis-a-vis New York's. Although the court below cited *Boston Stock Ex-*

change, App. 18a-19a, it made no effort to explain how its decision could be reconciled with the rationale of that case.

C. *Kraft* Provides No Basis for Disregarding *Fulton* and *Boston Stock Exchange*

The attempt of the New Hampshire court to sidestep the inconsistency of its conclusion with *Fulton* and *Boston Stock Exchange* rests on its misguided reliance on this Court's footnote 23 in *Kraft*. The court below read this footnote as authorizing consideration of "the aggregate tax imposed upon a unitary business," App. 17a, including the tax imposed on *both* the dividend recipient *and* the dividend payor. In so concluding, the court below completely misread and misapplied footnote 23.

Indeed, the New Hampshire court's "aggregate tax" analysis makes precisely the same mistake that this Court identified in footnote 23. There, this Court considered, in the context of Iowa's separate company reporting regime, an attempt to defend that State's discriminatory DRD provision with assertions that the "aggregate tax" on a parent with a domestic subsidiary doing business in Iowa might not always be less than the "aggregate tax" imposed by Iowa on a parent with a dividend-paying foreign subsidiary not doing business in Iowa. This Court rejected that defense by noting that it was inappropriate to include the Iowa tax imposed on the domestic subsidiary's earnings in the comparison analysis because "the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary." *Kraft*, 505 U.S. at 80 n.23. This Court concluded that the "aggregate tax" comparison offered by the State (and by the United States as *amicus curiae*) failed to compare taxpayers who are "most similarly situated." *Id.* In order to avoid including income for which there was an "independent basis for taxation" under Iowa's separate company reporting regime, this Court held that the "more appro

priate comparison is between corporations whose subsidiaries do not do business in Iowa." *Id.*

New Hampshire's tax regime imposes tax liability on domestic combined groups, on the one hand, and foreign corporations, on the other, as separate filing entities. A combined group doing business in New Hampshire files a return with the State, and any foreign corporation doing business there files its own separate return with the State. If the court below had adopted a proper reading of *Kraft*'s footnote 23, it would have concluded that the most similarly situated taxpayers for comparison purposes in this case are two domestic combined groups that do business in New Hampshire, one with a foreign subsidiary that also does business in New Hampshire and files a separate return there, the other with a foreign subsidiary that does not do business in the State. Assuming both foreign subsidiaries pay the same amount of dividends to their respective parent companies in a given year, the appropriate calculation would show that the total tax imposed on the combined group whose foreign subsidiary does business in the State will always be less than the total tax imposed on the combined group whose foreign subsidiary does not do business in the State. The reason for that is New Hampshire's discriminatory DRD, which is available to the combined group only to the extent that a dividend-paying foreign subsidiary generates taxable income in the State.

What would be *inappropriate* under *Kraft* in making the necessary comparison here would be to compare the "aggregate" New Hampshire tax liabilities of *both* the combined groups *and* their respective foreign subsidiaries. Yet, that is exactly what was done by the court below. Because there is as much of an "independent basis" for New Hampshire to tax the income of a foreign subsidiary doing business in the State as there was for Iowa to tax the income of the domestic subsidiary referenced in footnote 23, the decision of the court below to include the New Hampshire tax on the foreign

subsidiary's income in its "aggregate tax" calculation is directly contrary to this Court's teachings in *Kraft*.

In short, *Kraft* reinforces petitioner's position regarding the appropriate comparison for determining discrimination in this case, and it provides no basis for the New Hampshire Court's disregard of the controlling force of *Fulton* and *Boston Stock Exchange*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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March 2, 2007

APPENDIX

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE
MERRIMACK

No. 2005-668

GENERAL ELECTRIC COMPANY, INC.

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

Argued: July 21, 2006
Opinion Issued: December 5, 2006

Rath, Young and Pignatelli, P.C., of Concord (*William F. J. Ardinger* and *Andrew W. Serell* on the brief, and *Mr. Ardinger* orally), and *Walter Hellerstein*, of Athens, Georgia, on the brief, for the plaintiff.

Kelly A. Ayotte, attorney general (*Karen A. Schlitzer*, assistant attorney general, on the brief and orally), and *Kathleen J. Sher*, of Concord, on the brief, for the defendant.

HICKS, J. The plaintiff, General Electric Company, Inc. (GE), appeals the decision of the Superior Court (*Fitzgerald*, J.) granting motions filed by the defendant, New Hampshire Department of Revenue Administration (department), to dismiss for lack of standing and for summary judgment. We reverse the grant of the motion to dismiss and affirm the grant of the motion for summary judgment.

The record supports the following facts. This case involves business profits taxes paid by GE from 1990 through 1999

(the tax years). GE is a New York corporation with its principal offices in Connecticut, and with a place of business in Somersworth, New Hampshire. GE is the parent corporation of numerous affiliated corporations both domestic and foreign. None of GE's foreign affiliates was domiciled in or transacted business within New Hampshire during the tax years.

During the tax years, GE transacted business within New Hampshire as a "business organization" and was subject to the business profits tax (BPT). RSA 77-A:1, I (2003) (amended 2004), :2 (2003), :6, I (2003). GE paid the BPT during the tax years, but maintains that its tax liability was miscalculated resulting in overpayment. Specifically, GE challenges the constitutionality of RSA 77-A:4, IV (2003), which permits a parent corporation to take a deduction for dividends received from its corporate subsidiaries when the gross business profits of the subsidiaries have already been subject to tax in New Hampshire. The department denied GE's requests to use this deduction for dividends it received from its foreign subsidiaries, since they did not transact business in the state and therefore their gross business profits were not subject to tax in New Hampshire.

GE and the department executed two settlement agreements agreeing, among other things, that GE would receive a refund of approximately $3.15 million should the foreign dividend deduction issue be resolved in GE's favor. GE subsequently filed with the department requests for refunds and petitions for redetermination and reconsideration regarding its BPT returns. Because the department's hearings officer lacked the authority to determine the constitutionality of RSA 77-A:4, IV, GE petitioned the superior court for review pursuant to RSA 21-J:28-b, IV (2000) (amended 2003). GE moved for summary judgment and the department moved to dismiss and for summary judgment. The trial court granted the department's motion to dismiss on the ground that GE

lacked standing to challenge RSA 77-A:4, IV. The trial court alternatively granted the department's motion for summary judgment finding that, even if GE had standing to challenge the statute, the deduction in RSA 77-A:4, IV does not discriminate against foreign commerce in violation of the Commerce Clause of the Federal Constitution.

We begin with a review of New Hampshire's BPT regime. Calculation of a business's tax liability requires an initial determination of whether the business is "unitary" within the meaning of RSA 77-A:1, XIV (2003). A "unitary business" is "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." RSA 77-A:1, XIV. Neither party disputes that GE and its subsidiaries operate as a unitary business.

The tax liability of a unitary business is calculated using a combined reporting method that apportions the income of the unitary business to the state. RSA 77-A:1, XIII, XV, XVI (2003). The income from all domestic members of the unitary business, which are collectively referred to as the "water's edge combined group," RSA 77-A:1, XV, is aggregated in the combined report. RSA 77-A:1, XVI. The income of foreign members of the unitary business is excluded from the combined report if the foreign members qualify as an "overseas business organization[ ]." RSA 77-A:1, XV. "Overseas business organizations" (OBOs) are those business organizations "with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." RSA 77-A:1, XIX (2003). Although an OBO is not considered part of the water's edge combined group, it may still qualify as a unitary member. RSA 77-A:1, XIV, XV.

Once the net income from all members of the water's edge group is combined, any domestic "intergroup activity" such as the payment of dividends or royalties is excluded in determining the "gross business profits" of the group. *N.H. Admin. Rules*, Rev 302.10(b); *see* RSA 77-A:3, I (2003). The "gross business profits" are then apportioned to the state using three factors: property, payroll and sales. RSA 77-A:3, I. The resulting amount constitutes the "New Hampshire water's edge taxable business profits" of the group. See RSA 77-A:1, IV, XV, XVI; *N.H. Admin. Rules*, Rev 301.02. In this calculation, the dividends of an OBO that are paid to a member of the water's edge combined group are initially excluded from the group's gross business profits and are apportioned separately to determine the "New Hampshire foreign dividends taxable business profits." RSA 77-A:3, II(b) (2003); *N.H. Admin. Rules*, Rev 311.24(a), (f). The "New Hampshire foreign dividends taxable business profits" are then added to the "New Hampshire water's edge taxable business profits" to produce "New Hampshire taxable business profits." RSA 77-A:3, II(b)(6). The applicable tax rate is then applied, resulting in the tax due. RSA 77-A:2 (2003). In this manner, dividends paid by a foreign member of the unitary group to domestic members are apportioned to New Hampshire and taxed.

Pursuant to the parties' settlement agreement, GE and its domestic unitary affiliates are to be treated as one water's edge combined group within the meaning of RSA 77-A:1, XV. As such, the income of GE's foreign subsidiaries was excluded from the calculation of GE's tax liability for the tax years because each was an OBO within the meaning of RSA 77-A:1, XIX. However, pursuant to RSA 77-A:3, II(b), the dividends paid to GE by its foreign subsidiaries remained subject to an apportioned tax. It is the inclusion of these foreign dividends in calculating GE's taxable business profits that GE contests in this appeal.

RSA 77-A:4, IV provides for the following deduction from gross business profits:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

RSA 77-A:4, IV has traditionally been used by corporations with affiliates or subsidiaries that file separately, and not under the combined reporting method. In such instances, RSA 77-A:4, IV allows a deduction for dividends paid to taxable parent corporations by subsidiaries that conducted business in the state and were therefore subject to a separate BPT. The dividends received from foreign subsidiaries that do not conduct business in the state and, accordingly, pay no BPT, do not qualify for the deduction allowed by the statute. RSA 77-A:4, IV.

On appeal, GE argues that the trial court improperly granted the department's motion for summary judgment and that by limiting the dividends-received deduction to those parents whose subsidiaries conduct business in the state, the statute facially discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution. GE also appeals the trial court's grant of the department's motion to dismiss based upon a lack of standing.

I. Motion to Dismiss

> In considering a motion to dismiss, our standard of review is whether the allegations in the plaintiff's plead-

> ings are reasonably susceptible of a construction that would permit recovery. We assume the plaintiff's pleadings to be true and construe all reasonable inferences drawn therefrom most favorably to it. We need not assume the truth of statements in the plaintiffs complaint, however, which are merely conclusions of law.

In re Juvenile 2004-789, 153 N.H. 332, 334 (2006) (quotation and brackets omitted). Since the trial court applied RSA 77-A:4, IV to an undisputed set of facts, this appeal presents a question of law that we review *de novo*. *Id.*

For a court to hear a party's complaint, the party must have standing to assert the claim. *Appeal of Richards*, 134 N.H. 148, 154, *cert. denied*, 502 U.S. 899 (1991). The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005).

The trial court found that GE failed to show that "RSA 77-A:4, IV directly and specifically affect[ed] its rights." Adopting the department's statutory application argument, the court found that the statute did not apply generally to parents with foreign subsidiaries. The court also found that RSA 77-A:4, IV did not apply specifically to GE since "the purpose of the statute is to prevent double taxation" and GE's foreign subsidiaries were never subject to taxation in New Hampshire.

To qualify for the dividend-received deduction, RSA 77-A:4, IV requires that the dividend recipient must qualify as a "parent of an affiliated group" as defined by the United States Internal Revenue Code (IRC). RSA 77-A:4, IV. Section 1504(a) of the IRC defines "affiliated group," in part, as: "1 or more chains of includable corporations connected through stock ownership with a common parent." 26 U.S.C. § 1504(a)(1)(A) (2000). This term is further defined in the statute to require minimum stock ownership of eighty percent

between the parent and its affiliates and to limit the type of corporations that are considered "includable." *Id.* § 1504(a)(2)(B) (2000). Foreign corporations are specifically excluded from the definition of "includable corporation." *Id.* § 1504(b)(3) (2000). The trial court relied in part upon this exclusion to find that GE does not have standing to challenge the constitutionality of RSA 77-A:4, IV because GE's challenge relates only to its foreign subsidiaries. We disagree.

The plain language of RSA 77-A:4, IV shows that the phrase "parent of an affiliated group" refers to the parent company's status, and not that of the subsidiaries. In other words, as long as the stock requirements are met with regard to an includable subsidiary, it satisfies the first condition of the statute in order to receive the dividend-received deduction, which GE does. By its terms, the deduction is not necessarily limited to parents with dividend-paying subsidiaries that are also members of the affiliated group. Therefore, we hold that GE qualifies as a "parent of an affiliated group" under RSA 77-A:4, IV. However, we express no opinion as to whether the statute would apply to a parent having *only* foreign subsidiaries, as that is not the case presently before us.

The department also argues, and the trial court agreed, that GE lacks standing to challenge RSA 77-A:4, IV because "GE is a unitary business and RSA 77-A:4, IV does not apply and/or affect the way in which GE was taxed in New Hampshire during the applicable tax years." As a unitary business, GE is required to file under the combined reporting method discussed above. RSA 77-A:1, XIII-XVI, :3, I-III (2003). Under the combined reporting method, it makes no difference whether a corporation's subsidiaries do business in-state or out-of-state because the income from every member of the unitary group is combined and apportioned. However, because New Hampshire uses the water's edge method of apportionment, the combined income is limited to that

derived from domestic members of the unitary group. RSA 77-A:1, XV.

Any income from a foreign member of GE's unitary group was excluded from GE's combined report and was not taxed. Further, because none of GE's foreign subsidiaries did any business in New Hampshire, they did not file separate tax returns with the state. The department argues on appeal that since the purpose of RSA 77-A:4, IV is "to prevent double taxation," the statute is not applicable to GE's tax status because its foreign subsidiaries did not file separate returns in New Hampshire, were never subject to income taxation, were not taxed twice, and therefore were not entitled to receive the dividend-received deduction.

Even if we were to accept the department's argument that RSA 77-A:4, IV does not apply to GE's foreign dividends because of GE's unitary status and usage of the water's edge combined reporting method - standing is conferred upon GE to challenge the statute for the very reason that it was denied the statute's benefit. The fact that none of GE's subsidiaries conducted business within the state and thus filed no separate BPT returns or that GE operates as a unitary business does not preclude GE from challenging RSA 77-A:4, IV. Any corporate parent that pays BPT in New Hampshire but is ineligible for the dividend-received deduction in RSA 77-A:4, IV is a proper party to bring suit for a determination of whether the basis upon which it is ineligible is constitutionally permissible. Such an adjudication directly and specifically affects GE's rights as a parent corporation paying BPT in the state. *See Hughes*, 152 N.H. at 35; *Appeal of Richards*, 134 N.H. at 154. We hold that GE has sufficient interest in the outcome of this litigation to bring a constitutional challenge to RSA 77-A:4, IV. Accordingly, we reverse the order granting the department's motion to dismiss.

II. Summary Judgment

Next, we consider whether the trial court properly granted summary judgment to the department. A motion for summary judgment may be granted only where no genuine issue of material fact is present and the moving party is entitled to judgment as a matter of law. *Soper v. Purdy*, 144 N.H. 268, 270 (1999). In determining whether summary judgment should be granted, we consider the affidavits and other evidence submitted below, and any reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. *Id.*

The trial court based its ruling upon a determination that "RSA 77-A:4, IV does not discriminate against foreign commerce and therefore, does not violate the United States Commerce Clause." The facts are not disputed by the parties and the question of whether RSA 77-A:4, IV violates the Commerce Clause of the Federal Constitution is a question of law that we review *de novo*. *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 255 (1999), *cert. denied*, 529 U.S. 1021 (2000).

Before we address the underlying issue of facial discrimination, we must first address GE's statutory construction argument regarding RSA chapter 77-A (2003).

A. Statutory Construction

GE argues that since foreign subsidiaries are not included as part of the water's edge combined group, they must file a separate BPT return if they conduct business in the state, thereby allowing use of the dividend-received deduction. *See* RSA 77-A:1, I (defining business organization); RSA 77-A:2 (imposing BPT on every business organization); RSA 77-A:6, I (requiring a BPT return). The department largely ignores this argument, focusing nearly its entire brief upon a comparison of domestic subsidiaries and foreign subsidiaries. However, the issue on appeal, which is consistent with GE's

argument below, focuses specifically upon whether RSA 77-A:4, IV facially discriminates against parents of dividend-paying foreign subsidiaries which do not conduct business in the state.

The department addresses this scenario summarily, asserting that any dividends from a foreign unitary group member paid to a member of the domestic unitary group that have been subject to taxation will already be excluded from the taxable business profits in order to prevent double taxation in violation of the Federal Constitution. To support this assertion, the department cites only to RSA 77-A:4, X (2003), which merely provides for the addition of expenses to gross business profits where a corporation has excluded gross business profits related to those expenses "pursuant to federal constitutional law." The department concludes from this that "RSA 77-A:4, IV never enters the analysis in a combined reporting regime." GE counters that the taxing regime does not operate in this manner and that foreign subsidiaries conducting business in the state would be required to file a separate BPT return, and any dividends paid to the parent would be deducted pursuant to RSA 77-A:4, IV.

We note that GE does not have any foreign subsidiaries that conduct business in the state. It is uncertain, therefore, exactly how the state taxing regime, including RSA 77-A:4, IV, would operate if it did. Essentially, GE asks us to evaluate a hypothetical situation. Typically, we will not invalidate a statute based upon a hypothetical factual scenario that is not before us. *New England Dragway v. M-O-H Enters.*, 149 N.H. 188, 192 (2003). However, in the context of New Hampshire's tax system, a facial attack on RSA 77-A:4, IV does raise broad constitutional concerns and is likely to come before us again. In order to reach the merits of this claim, we accept GE's hypothetical and assume without deciding that the parent of a foreign subsidiary doing business in the state

might, under certain circumstances, be entitled to the dividend-received deduction in RSA 77-A:4, IV.

The department also argues that the dividend-received deduction is of limited scope, allowing a deduction only up to the amount of gross business profits already taxed. In contrast, GE argues that RSA 77-A:4, IV allows a "full deduction for a dividend received from a foreign subsidiary doing business in New Hampshire."

This court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *Appeal of Ann Miles Builder*, 150 N.H. 315, 318 (2003). When the issue raised presents a new question of statutory construction, we begin our analysis with an examination of the statutory language. *Id.* We are also mindful of the well-established principle of statutory construction that all words used should be given their ordinary meaning unless a different meaning is indicated from the context in which they are used. *Dupont v. Chagnon*, 119 N.H. 792, 794 (1979).

The statutory construction urged by GE, which would allow a "hyper-deduction" regardless of the amount of the tax paid in New Hampshire, might well run afoul of the Commerce Clause. However, we agree with the department that the statute, by its terms, only allows a limited dividend deduction for the amount of business profits already taxed by the state. RSA 77-A:4, IV; *cf. First Financial Group of N.H., Inc. v. State*, 121 N.H. 381, 385 (1981); *Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. 105, 109 (1974). The purpose of the dividend-received deduction is "to prevent double taxation on the *identical* gross business profits" of a subsidiary and its parent. RSA 77-A:4, IV (emphasis added). Allowing a full deduction for dividends paid to a parent when the subsidiary conducted only a small amount of business in the state and thus was only taxed on a small amount of its profits yields an absurd result. Although the amount of business conducted in the state by the subsidiary may allow the parent

to deduct the full amount of the dividend received in some situations, this will not always be the case. We therefore continue our analysis with the understanding that when RSA 77-A:4, IV does allow for a dividend-received deduction, the deduction is limited by the amount of income already taxed in New Hampshire.

B. Commerce Clause

This brings us to the central issue in this case: Whether RSA 77-A:4, IV facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire.

The Commerce Clause of the United States Constitution reserves to Congress the right to "regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. This clause also imputes a "negative aspect" which prohibits states from unjustifiably discriminating against or burdening interstate and foreign commerce. *Caterpillar Inc.*, 144 N.H. at 257 (quotation omitted). In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court outlined the test for determining whether a state taxing regime survives a challenge under the Commerce Clause. To be valid, the tax must: (1) have a "substantial nexus with the taxing State"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State." *Id.* at 279.

The Supreme Court has defined Commerce Clause "discrimination" in numerous ways over the years. In 1977, the Court found discrimination where a tax "provid[ed] a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quotation omitted). In 1994, the Court defined it as "differential treatment of in-state and out-of-state economic interests

that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oreg.*, 511 U.S. 93, 99 (1994). In 1996, the Court upheld the principle that a state taxing regime is discriminatory if it "taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quotation and brackets omitted). "State laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Id.* (quotation omitted).

The party challenging the constitutionality of a state tax bears the burden of proving discrimination. *Caterpillar Inc.*, 144 N.H. at 258. In order to prove that a state tax statute violates the Commerce Clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only prove discrimination against commerce. *Id.* However, statutes are presumed constitutional, and they will only be declared invalid "upon inescapable grounds." *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005) (quotation omitted).

GE argues that "RSA 77-A:4, IV discriminates in violation of the commerce clause because it affords a deduction for dividends received from corporations that do business in New Hampshire, while it denies a deduction for dividends received from corporations that do not do business in New Hampshire." The department responds that it is constitutional for states to proportionately tax foreign source income and that GE fails to show that "foreign commerce is taxed more heavily than intrastate commerce."

As an initial matter, we note that the state's right to tax foreign dividends is not contested. In *Mobil Oil Corporation v. Commissioner of Taxes*, 445 U.S. 425 (1980), the Supreme Court upheld the states' right to tax foreign-source dividend income when the dividend is received by a corporation doing business in the state. In *Caterpillar Inc.*, we upheld the

inclusion of royalty and interest payments made by a foreign subsidiary in the net income calculation of a New Hampshire business filing a combined report. Caterpillar Inc., 144 N.H. at 258-59. There, we noted that these payments "were expenses to the foreign members, deducted on each payor's foreign income tax return . . . [and as such] . . . constituted income to the domestic recipients." *Id.* at 259.

We begin our Commerce Clause analysis with the Supreme Court's decision in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). Although the tax system in *Kraft* differs from the one before us, the principles enumerated in that decision are helpful to the resolution here. In *Kraft*, the income of domestic subsidiaries that did not conduct business in Iowa was not taxed, and the in-state parent was permitted to deduct dividends received from them. In contrast, the in-state parent was not permitted to deduct dividends received from its foreign subsidiaries doing business abroad. *Id.* at 74. Noting that "Iowa is not a State that taxes an apportioned share of the entire income of a unitary business," *id.* at 74 n.9, the Court held that the tax system was discriminatory, because, among other things, Iowa taxed neither the income of, nor dividends paid by, domestic members of the unitary group that did not conduct business in the state. *Id.* at 80.

In its analysis, the Court added a footnote that has been the focus of many state court decisions over the past fourteen years. It provides:

> If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the

> domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

Id. at 80 n.23 (citation omitted). Thus the Court distinguishes between a single entity filing system where income from out-of-state domestic subsidiaries is not taxed at all and a combined reporting method system where out-of-state domestic income is taxed through apportionment. This distinction has been relied upon by some state courts to uphold ostensibly discriminatory taxation provided a combined reporting method is properly used. *See, e.g., Appeal of Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993); *Du Pont de Nemours v. State Tax Assessor*, 675 A.2d 82 (Me. 1996).

Distinguishing its taxing system from that in *Kraft*, the Kansas Supreme Court upheld the state's combined reporting tax formula which permitted in-state corporations to deduct dividends received from domestic subsidiaries, but included dividends received from foreign subsidiaries in the calculation of taxable income. *Thiokol*, 864 P.2d at 1185. The court essentially held that this formula effectively "balanc[ed] the [tax] burdens" of each entity and accepted the state's argument that:

> the aggregate tax imposed by [the state] on a unitary business with a domestic subsidiary would not be less

> burdensome than that imposed by [the state] on a unitary business with a foreign subsidiary because the income of the domestic subsidiary would be . . . taxed while only the dividend of the foreign subsidiary would be taxed.

Id. at 1186.

Similarly, in *Du Pont*, the Maine Supreme Judicial Court followed the reasoning of *Thiokol* and upheld an analogous taxing formula. *Du Pont*, 675 A.2d at 83. The court found that by proportionately taxing the income received from domestic subsidiaries and the dividends received from foreign subsidiaries, the state's taxing system "provid[ed] a type of 'taxing symmetry.'" *Id.* at 88. The court further held that "the inclusion of dividends paid by foreign subsidiaries does not constitute . . . facial discrimination against foreign commerce." *Id.*

The *Thiokol* and *Du Pont* courts looked at the overall tax burden placed upon the unitary business to determine whether the general taxing formula discriminated against foreign commerce. *Thiokol*, 864 P.2d at 1186; *Du Pont*, 675 A.2d at 88. Several other courts have upheld the principles outlined in *Thiokol* and *Du Pont*, although some have invalidated taxing regimes as discriminatory for other reasons not applicable here. *See Hutchinson Technology v. Com'r of Revenue*, 698 N.W.2d 1, 17 (Minn. 2005) ("But in contrast to the circumstances in *Morton Thiokol* and *Du Pont*, which involved taxes imposed by the same state for which the dividend-received deduction was intended to compensate, the additional tax liability for which the dividend-received deduction would compensate here is *federal* tax liability"); *Emerson Elec. Co. v. Tracy*, 735 N.E.2d 445, 448-49 (Ohio 2000) (recognizing the validity of the "taxing symmetry" principle where domestic and foreign subsidiaries are both taxed once); *Conoco, Inc. v. Taxation & Revenue Dept.*, 931 P.2d 730, 735 (N.M. 1996) (same), *cert. denied*, 521 U.S. 1112 (1997); *Bernard Egan & Co. v. State, Dept. of Rev.*, 769 So. 2d 1060,

1061 (Fla. Dist. Ct. App. 2000) (upholding similar taxing regime as constitutional because domestic and foreign subsidiary income was equally treated under the consolidated reporting method), *cert. denied*, 534 U.S. 995 (2001); *Caterpillar, Inc. v. C.I.R.*, 568 N.W.2d 695, 701 (Minn. 1997) (adopting similar analysis as applied to foreign interest and royalty payments), *cert. denied*, 522 U.S. 1112 (1998); *Fujitsu IT Holdings v. Franchise Tax Bd.*, 15 Cal. Rptr. 3d 473, 489-90 (Ct. App. 2004) (adopting the "taxing symmetry" principle in *Du Pont*, and upholding a taxing regime which taxed foreign dividend income but excluded dividend income from domestic subsidiaries).

While we recognize that GE does not challenge the state's combined reporting method but rather focuses only upon the alleged disparate treatment between foreign subsidiaries doing business in the state and those that do not, we find the principles of "aggregate tax" burdens and "taxing symmetry" enumerated in these cases helpful to the analysis here. The United States Supreme Court requires analysis of the aggregate tax burden when reviewing a claim that a tax discriminates in violation of the Commerce Clause: "a proper analysis must take the whole scheme of taxation into account." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 69 (1963) (quotation and citation omitted); *Kraft*, 505 U.S. at 80-81 & n.23 (speaking in terms of the "aggregate tax imposed by [a state] on a unitary business").

Following the reasoning in these cases, we assess New Hampshire's taxing regime as a whole and look at the aggregate tax imposed upon a unitary business. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). Viewing RSA 77-A:4, IV not in isolation, but as a part of a larger taxing system, we find no improper discriminatory treatment. For purposes of this appeal, we assume that a foreign

subsidiary conducting business in New Hampshire is subject to the BPT under RSA chapter 77-A and must pay a tax apportioned upon its profits attributable to the state. RSA 77-A:1, IV; RSA 77-A:3, I. Any dividends paid to a parent corporation also located within the state may be deducted pursuant to RSA 77-A:4, IV up to the amount of business profits already taxed. RSA 77-A:4, IV; *First Financial*, 121 N.H. at 385. This ensures that the income of the business entity is taxed only once. *Id.* In contrast, a foreign subsidiary that does not conduct business in the state is not subject to the BPT and its income is therefore not directly taxed. RSA 77-A:1, I. Therefore, any dividends paid to an in-state parent corporation are apportioned and taxed as income; they are not subject to a deduction under RSA 77-A:4, IV because that dividend income has been taxed only once.

Accordingly, the New Hampshire BPT regime contains the type of "taxing symmetry" upheld in *Du Pont* and the "balancing the burdens" formula affirmed in *Thiokol*. Although the in-state parent is not taxed directly in the first example given above, because by nature of the unitary business concept the parent and its subsidiary are considered a single business entity, it follows that the parent ultimately pays the BPT of its subsidiary. *See Concord Inv. Corp.*, 114 N.H. at 109; *Caterpillar Inc.*, 144 N.H. at 259.

Furthermore, by viewing the state's taxing regime as a whole, we conclude that RSA 77-A:4, IV does not facially discriminate by any means offensive to the Commerce Clause. Since both the unitary business with the foreign subsidiary operating in New Hampshire and the unitary business with the foreign subsidiary not operating in New Hampshire are each only taxed once, there is no "differential treatment" that benefits the former and burdens the latter, *Oregon Waste*, 511 U.S. at 99; the latter is not taxed more heavily than the former, *Fulton*, 516 U.S. at 331; and the former is not given a "direct commercial advantage" over the latter, *Boston Stock*

Exchange, 429 U.S. at 329 (quotation omitted). Although the total tax assessed in the end may not be exactly equal, we have noted before that the state's taxation methods need "not apportion income perfectly[;] the Federal Constitution does not require mathematical exactitude, only a rough approximation." *Caterpillar Inc.*, 144 N.H. at 262 (quotations omitted).

In spite of these decisions, GE argues that "[e]very court that has examined dividends received deduction statutes substantially the same as RSA 77-A:4, IV has struck down the provisions as violating the Commerce Clause." GE cites several decisions to support this claim.

In *Dart Industries, Inc. v. Clark*, 657 A.2d 1062 (R.I. 1995), the Supreme Court of Rhode Island invalidated a statutory provision which effectively excluded domestic dividends but required inclusion of foreign dividends in the calculation of a corporation's Rhode Island net income. *Id.* at 1063-64. The court held that the statute contained the same "fatal flaw" as the statute in *Kraft*, and found that "Rhode Island's [taxing regime] treats dividends paid by a foreign corporation less favorably than those paid by domestic corporations." *Id.* at 1066. Similarly, in *D.D.I., Inc. v. State ex rel. Clayburgh*, 657. N.W.2d 228, 231 (N.D. 2003), the court noted that the tax commissioner conceded that the state's dividends received deduction was discriminatory and focused instead upon the commissioner's argument that it was constitutional as a compensatory tax. Therefore, no further analysis was conducted regarding facial discrimination.

In two cases from California, two separate courts of appeal invalidated statutes that permitted a deduction only for dividends paid out of income that had already been subject to tax in the state. *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Ct. App. 2003), *cert. denied*, 540 U.S. 1178 (2004); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Ct. App. 2000). But *see Fujitsu IT Holdings*, 15 Cal. Rptr. 3d at 489-90. In *Ceridian*, the Franchise Tax Board

for the State of California (FTB) argued that the provision was not unconstitutional because it "avoids double taxation." *Ceridian*, 102 Cal. Rptr. 2d at 619. The court rejected this argument as inconsequential, since the statute facially discriminated against out-of-state corporations by "favor[ing] domestic corporations over their foreign competitors in raising capital among California corporations." *Id.* at 620. Similarly, in *Farmer Brothers*, the court held that the dividend-received deduction was discriminatory on its face because it "favors dividend-paying corporations doing business in California and paying California taxes over dividend-paying corporations which do not do business in California and pay no taxes in California." *Farmer Bros.*, 134 Cal. Rptr. 2d at 398. The court relied, in part, upon *Fulton*.

In *Fulton*, the Supreme Court held that North Carolina's "intangibles tax" assessed against corporate stock owned by state residents "facially discriminates against interstate commerce." *Fulton*, 516 U.S. at 333. The tax was calculated using a formula that allowed taxpayers who owned stock in in-state corporations, which were subject to tax in North Carolina, to take a limited "percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina." *Id.* at 328.

We do not agree that these cases require a finding that RSA 77-A:4, IV is discriminatory. *Fulton* is not analogous to the present case because there, the state taxing regime taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations. *Id.* at 333. In the present case, the state is instead taxing a proportionate share of dividend *income* coming into the state. *See generally Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 187-88 (1983) (distinguishing taxing regime which taxed property from regime which taxed income); *Mobil Oil Corp.*, 445 U.S. at 446.

In addition, we do not find the decisions of the California appellate courts and in *Dart* and *D.D.I.* to be persuasive here. While the deduction provisions invalidated in these cases appear similar to the New Hampshire dividend-received deduction at issue, it may be that in those cases, there was no taxing symmetry as there is here. Regardless, we do not agree with their analysis. We also note that a more recent California Court of Appeals decision, which cited *Du Pont*, upheld a limited deduction for dividends received from foreign corporations while allowing a full deduction for dividends received from domestic corporations. *Fujitsu IT Holdings*, 15 Cal. Rptr. 3d at 489.

As stated above, we examine our state taxing regime as a whole, and look at the aggregate tax assessed against the unitary business in New Hampshire. We conclude that RSA 77-A:4, IV does not facially discriminate against a dividend-paying foreign subsidiary that does not conduct business in New Hampshire.

There being no genuine issue of material fact in dispute and the department being entitled to summary judgment as a matter of law, we affirm the trial court's grant of the department's motion for summary judgment. Because we hold that RSA 77-A:4, IV is not unconstitutional on its face, we need not address the compensatory tax issue.

Affirmed in part and reversed in part.

BRODERICK, C.J., and DALIANIS, DUGGAN and GALWAY, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS. SUPERIOR COURT

No. 04-E-0305

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ORDER

Pursuant to RSA 21-J:28-b, IV, General Electric Company, Inc. ("GE") appeals a June 25, 2002 decision of the Commissioner of the New Hampshire Department of Revenue Administration ("DRA") relating to GE's Business Profit Tax ("BPT") filings for the years 1990-1999. GE brings its petition on three counts alleging that DRA's rejection of its claim is erroneous because: (1) the dividends received deduction of RSA 77-A:4, IV, New Hampshire's BPT statute, facially discriminates against foreign commerce in violation of the commerce clause of the United States Constitution; (2) the dividends received deduction of RSA 77-A:4, IV, as applied discriminates against foreign commerce in violation of the commerce clause of the United States Constitution; and (3) the taxation of the dividends paid by GE foreign subsidiaries results in grossly distorted and unfair taxation in violation of the due process clause of the United States Constitution.[1] Before the Court is DRA's Motion to Dismiss

[1] The Court granted GE's Motion for a Voluntary Non-Suit as to Count Three with prejudice.

counts one and two. GE objects and moves to strike DRA's Motion to Dismiss. Also before the Court is GE's Motion for Summary Judgment to which DRA objects and DRA's Motion for Summary Judgment to which GE objects. For the reasons provided below, the Court finds and rules as follows.

I. STANDARD OF REVIEW

> Within 30 days of the notice of decision, the taxpayer may appeal such decision by written application to the board of tax and land appeals. or the superior court, in the county in which the taxpayer resides or has a place of business or resident agent. The board of tax and land appeals or the superior court, as the case maybe, shall hear the appeal de novo. Each party may introduce whatever evidence it believes necessary, limited only by the evidentiary rules of the forum. Legal issues shall be limited to those raised before the commissioner, with the exception that the taxpayer may raise additional legal claims addressing constitutional issues; and either party may raise additional legal claims upon a showing of good cause.

RSA 21-J:28-b, IV.

II. FACTUAL BACKGROUND

GE is a New York corporation with its principal offices located in Fairfield, Connecticut. GE conducts extensive business activities throughout the United States and has a place of business in Somersworth, New Hampshire. Because GE conducts business in New Hampshire, it was required to file a BPT return and pay a New Hampshire BPT.

During the tax years 1990 through 1999, the tax years at issue in this appeal, GE served as a common parent company to several subsidiary corporations that performed various business activities both within and outside the United States. The foreign based subsidiaries had 80 percent or more of their

average payroll and property outside the United States. During each of the tax years, the foreign subsidiaries paid dividends to GE and its U.S. based affiliates, termed as GE's "water's edge group."

GE filed the BPT returns in New Hampshire for each of the tax years at issue, and based those returns upon the combined net income of its water's edge group. DRA required GE to include the dividends that it received from its foreign subsidiaries on its BPT returns.

On September 15, 2001, GE and DRA executed two Settlement Agreements which substantially resolved GE's BPT tax liability for the tax years at issue. The Settlement Agreements resolved all of the disputes between GE and DRA except for a penalty issue and the foreign dividend issue. *See* GE's Appeal at 2.

On June 25, 2002, DRA denied GE's request for a refund of taxes paid with respect to dividends that GE and its affiliates received from their foreign subsidiaries during the tax years 1990 through 1999. The DRA Hearing Officer declined to answer the constitutional challenge that GE raised with respect to RSA 77-A:4, IV. The Hearing Officer's final order provides:

> The relief requested by General Electric regarding the Foreign Dividend Issue for each of the 1990-1999 Tax Years is denied because the Hearing Officer is not empowered to decide whether RSA 77-A:4, IV violates the United States Constitution. This denial is issued without prejudice to the rights of General Electric to present the Foreign Dividend Issue to the Superior Court for determination whether RSA 77-A:4, IV violates the United States Constitution and whether General Electric is entitled to a refund.

GE's Mem. of Law in Supp. of its Mot. for Summ. J. at 9.

Following the June 25, 2002 decision, GE filed this appeal. The sole issue presented on appeal is the foreign dividend issue. *See* GE Appeal at 2. GE has styled the foreign dividend issue as:

> whether the dividend received deduction allowed under RSA 77-A:4, IV should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution and results in unfair taxation out of all proportion to the activities carried on by GE in New Hampshire in violation of the Due Process and Commerce Clauses of the United States Constitution.

Id. GE asserts in its appeal that "[p]ursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738." *Id.* at 3.

III. DRA's MOTION TO DISMISS and GE's MOTION TO STRIKE

A. MOTION TO DISMISS STANDARD

In ruling on a motion to dismiss, the Court must determine "whether the plaintiffs allegations are reasonably susceptible of a construction that would permit recovery." *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 144 N.H. 626, 628 (2000) (quoting *Miami Subs Corp. v. Murray Family Trust and Kenneth Dash Partnership*, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *See Williams v. O'Brien*, 140 N.H. 595, 598 (1995). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiffs pleadings and construes [a]ll reasonable inferences in the light most favorable to him." *Hobin*, 144 N.H. at 628 (citation omitted). Dismissal is appropriate "[i]f the facts as pled cannot constitute a basis for legal relief." *Hobin*, 144 N.H. at

628 (quoting *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998)).

B. DISCUSSION

DRA moves to dismiss GE's constitutional challenge to RSA 77-A:4, IV on the grounds that GE has not raised a justiciable controversy and that GE has no standing to challenge the constitutionality of RSA 77-A:4, IV. DRA argues that RSA 77-A:4, IV is inapplicable to the way in which GE was subject to taxation in New Hampshire for the tax years at issue. Specifically, DRA maintains that because GE is a unitary business, and RSA 77-A:4, IV applies to affiliated entities, RSA 77-A:4, IV is inapplicable to the facts presented here. Further, DRA asserts that RSA 77-A:4, IV applies only "'Din the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the Internal Revenue Code.'" DRA's Mot. to Dismiss at 3 (citing RSA 77-A:4, IV). Because dividends from GE's foreign subsidiaries are at issue and the applicable section of the Internal Revenue Code excludes foreign corporations, DRA avers that RSA 77-A:4, IV is inapplicable to the way in which GE was taxed in New Hampshire.

GE refers to DRA's arguments for dismissal as "statutory application" arguments and moves the Court to strike those arguments on the bases that: (1) the Settlement Agreements preclude DRA from making the statutory application arguments; (2) DRA failed to preserve the issue during the administrative process; (3) DRA admitted in its answer to its petition that the issue of the constitutionality of RSA 77-A:4, IV applied to GE during the tax years a issue; and (4) DRA should not be permitted to raise the statutory application argument because it is inconsistent with its obligation to administer the tax laws equitably and in good faith.

With respect to whether the Settlement Agreements preclude DRA from making the statutory application argument,

GE maintains that in the Settlement Agreements, the parties agreed that all claims had been settled except the constitutionality of RSA 77-A:4, IV. Therefore, because the statutory application argument does not address the constitutionality of RSA 77-A:4, IV, GE argues that DRA is prohibited from raising that argument here. The Court does not agree.

First, upon review of the Settlement Agreements, the Court observes that although the parties did in fact agree that the constitutionality of RSA 77-A:4, IV remains unsettled, paragraph 5 (A) of the Settlement Agreements contemplates that GE may not be a party-in-interest with respect to determining the constitutionality of RSA 77-A:4, IV. *See* Settlement Agreements, attached to GE's Appeal as Ex. A and B at ¶ 5. Moreover, the Settlement Agreements specifically provides that:

> [t]his Agreement is intended solely to expeditiously resolve the dispute with respect to Taxpayer's business profits tax liability for said periods, and is not, and shall not be construed as, an admission by any party as to the relative merits of any of the legal positions advocated by the parties in this case.

Id. at ¶ 9. In light of the specific language contained in the Settlement Agreements with respect to the parties' position concerning GE's prospective challenge to RSA 77-A:4, IV, the Court finds and rules that the Settlement Agreements do not bar DRA's statutory application argument.

Next, the Court rejects GE's contention that because DRA did not raise the statutory application argument during the administrative proceeding, it is precluded from raising it here. On March 8, 2002, the Audit Division of DRA filed a response to GE's petition, stating, in part, that:

> it should be noted that petitioner [GE] has not received dividends from an [Overseas Business Organization] OBO that has business activity in New Hampshire. The

> claimed discrimination is based entirely upon a hypothetical construct of how New Hampshire might tax the dividends received from a subsidiary with at least 80 percent of its average payroll and property outside the United States but that also had business activity in New Hampshire. 'Challenges to perceived discriminatory taxation must also rest upon concrete proof, not hypothetical scenarios.'

Audit Division Response to Petition at 8-9, attached to DRA's Obj. to GE's Mot. to Strike as Ex. A (citing *Sirrell v. State*, 146 N.H. 364 (2001)). The Audit Division's response, shows that DRA did raise the issue as to whether GE had standing to challenge the constitutionality of RSA 77-A:4, IV. Additionally, the Court notes that GE's appeal of the commissioner's June 25, 2002 decision to the Superior Court is *de novo*. *See* RSA 21-J:28-b, IV. Moreover, RSA 2I-J:28-b, IV provides that "[l]egal issues shall be limited to those raised before the commissioner, with the exception that the taxpayer may raise additional legal claims addressing constitutional issues . . ." Because GE has the right to raise its constitutional claims in this forum without being limited by what it raised in the administrative proceeding, it follows that DRA is well within its bounds to put forth any and all defenses it may have in defeating such claims. Therefore, contrary to GE's assertion, the issues raised at the administrative proceeding do not bar DRA from asserting its statutory application argument here.

Next, GE argues that DRA's answer to GE's appeal precludes DRA from raising its statutory application argument. In its appeal, GE stated in pertinent part:

> As set forth in more detail below, the Foreign Dividend Issue exists and applies to GE in each of the Tax Years. . . Pursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a

> refund to GE with respect to all the Tax Years in the aggregate amount of $3,154,738.

GE's Appeal at ¶ 11. In its answer, DRA admitted paragraph 11 in its entirety. *See* DRA's Answer at 2. DRA maintains that its admission refers to the Settlement Agreements which state "that the parties agreed that all claims were settled 'with the exception of the constitutionality under the applicable provisions of the United States Constitution of New Hampshire's dividends received deduction, RSA 77-A:4, IV, with respect to foreign dividends.'" DRA's Obj. to GE's Mot. to Strike at 7 (citing Settlement Agreements, attached to GE's Appeal as Ex. A and B at ¶ 3). The parties agreed in the Settlement Agreements that the sole issue presented in this appeal would be the constitutionality of RSA 77-A:4, IV. The Court does not construe DRA's answer to be evasive or restrict it from making the statutory application argument. Rather, its answer merely confirms the issue presented. *See generally* Super. Ct. R. 133. Thus, DRA's acknowledgement of the issue presented in paragraph 11 of GE's appeal does not preclude it from making its statutory application argument.

Further, the Court rejects GE's argument that DRA should not be permitted to raise the statutory application argument because it is inconsistent with its obligation to administer the tax laws equitably and in good faith. As noted above, in the Settlement Agreement, GE admits that it may not be a party-in-interest. Further, on March 2, 2002, the Audit Division of DRA provided GE with notice regarding its potential conflict with challenging the constitutionality of RSA 77-A:4, IV. Additionally, the standards set forth in RSA 21-J:28-b, IV do not preclude DRA from raising such an argument. Although the parties agreed in the Settlement Agreements that the foreign dividend issue remains in dispute, DRA has not forfeited its right to challenge the justiciability of that issue or GE's standing to bring such a claim.

Based on the foregoing, the Court DENIES GE's Motion to Strike.

Because GE's response to the merits of DRA's statutory application argument is more fully articulated in its Reply to DRA's Objection to GE's Motion for Summary Judgment, and DRA raises its statutory application argument in its Objection to GE's Motion for Summary Judgment and in its Surreply to GE's Reply to its Objection to GE's Motion for Summary Judgment, the Court considers the merits of the parties' relevant Summary Judgment Motions to determine whether GE has raised a justiciable question and has standing to litigate the issue that it brings before the Court. Although those arguments are found in the cited summary judgment pleadings, the Court still applies the Motion to Dismiss standard in evaluating the merits of DRA's statutory application argument.

DRA argues that GE does not have standing to challenge the constitutionality of RSA 77-A:4, IV because GE is a unitary business and RSA 77-A:4, IV does not apply and/or affect the way in which GE was taxed in New Hampshire during the applicable tax years. *See* DRA's Obj. to GE's Mot. for Summ. J. at 2. GE counters that DRA's statutory application argument is wrong as a matter of law because "it contradicts the plain meaning and intent of the statute, it ignores state constitutional strictures against double taxation, which . . . [are] the bedrock on which the dividends received deduction is constructed, and it is inconsistent with DRA's current actions in administering the BPT and RSA 77-A:4, IV." GE's Obj. to DRA's Mot. for Summ. J. at 3.

With respect to DRA's contention that there is no situation where RSA 77-A4, IV is operable, the Court observes that in 1986 New Hampshire enacted the water's edge legislation[2] in

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[2] "Water's edge method means the determination of taxable business profits for a group of business organizations conducting a unitary business

which a business entity is either part of a unitary group, and required to file combined reports or is a non-unitary business and files as a separate non-unitary business organization. *See* RSA 77-A:3, I, II, III. In *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 260 (1999), the New Hampshire Supreme Court states that "[i]n 1986, the legislature adopted the water's edge method, eliminating overseas business organizations from subjection to [business profits tax]." (citing Laws 1986, 153:1). To further illustrate this point, DRA argues that the plain language of RSA 77-A:4, N itself demonstrates that it is inapplicable to the way that GE is taxed in New Hampshire. RSA 77-A:4, IV provides the following limited deduction to corporations that received dividends from qualifying subsidiary corporations:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

In construing whether RSA 77-A:4, IV applies to the way in which GE was taxed, "[t]he starting point in the interpretation of a statute is the language of the statute itself." *Bradley Real Estate Trust v. Taylor, Commissioner*, 128 N.H. 441, 444 (citing *State Employees' Ass'n of N.H. v. Bd. of Trustees*, 120 N.H. 272, 273 (1980). "It is a well-established principle

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by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for members of the group, and apportioning the result as provided in RSA 77-A:3." RSA 77-A:1, XVI.

of statutory construction that all words used should be given their ordinary meaning unless a different meaning is indicated from the context in which they are used." *Dupont v. Chagnon*, 119 N.H. 792, 794 (1979).

DRA maintains that RSA 77-A:4, IV applies only "'[i]n the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the Internal Revenue Code.'" DRA's Mot. to Dismiss at 3 (quoting RSA 77-A:4, IV). Because dividends from GE's foreign subsidiaries are at issue and section 6 of the Internal Revenue Code excludes foreign corporations, *see* 26 U.S.C. § 1504(b)(3), DRA avers that RSA 77-A:4, IV is inapplicable to the way in which GE was taxed in New Hampshire.

GE does not dispute that it is a "unitary"[3] business, and, that it is not an "affiliated" business as referenced in the statute. GE states that "[biased on the express structure of RSA 77-A:4, IV, the 'affiliated group' definition applies to qualify the type of 'parent' that may be eligible for the deduction." GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. at 16. However, GE argues that "affiliated group cannot reasonably be read as a clause that qualifies the reference to 'subsidiary or subsidiaries' because the reference to the federal 'affiliated group' definition occurs in a prepositional phrase that modifies the word 'parent', and is located significantly before the term 'subsidiary' is even used." *Id.* at 17. Notwithstanding GE's contention, even if the federal definition of affiliated group which excludes foreign corporations is not applicable here, GE cannot escape the fact that it is a unitary business that filed a combined return for the tax years at issue and the plain and unambiguous language contained in RSA 77-A:4,

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[3] New Hampshire defines unitary business as "one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions." RSA 77-A:1, XIII.

IV does not specifically address that type of business scenario. Moreover, GE does not contest the fact that its foreign-based subsidiaries that paid dividends to it, were not subject to taxation in New Hampshire.

In construing the plain meaning and/or purpose of RSA 77-A:4, IV, the Court deems it readily apparent from the unambiguous words used in the statute that "[t]he purpose of this deduction is to prevent double taxation", RSA 77-A:4, IV, on "gross business profits [that] have already been subject to taxation under this chapter during the same taxable period." *Id.*

Maurice P. Gilbert, the Director of the Audit Division for DRA, makes the following affidavit statements as to the applicability of RSA 77-A:4, IV to unitary businesses. Mr. Gilbert states:

> [p]rior to 1986 a taxpayer was required to file a separate entity business profit tax return unless granted permission by the Department of Revenue Administration to file business profits tax returns on a combined basis if conducting a unitary business. . . Beginning in 1986 a taxpayer was required by the Department of Revenue Administration to file business profits tax returns on a combined basis if conducting a unitary business.

Aff. of Maurice P. Gilbert, Attached to DRA's Reply to GE's Obj. to DRA's Mot. for Summ J. and DRA's Surreply to GE's Reply to the DRA's Obj. to GE's Mot. for Summ. J. GE counters that "[t]he 'Combined Business Profits Tax Return' provides a specific line item that directs taxpayers to subtract 'Deductible dividends' from gross business profits." GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. at 20. The Corporation Business Profits Tax Return provides in pertinent part:

> In the case of a corporation which is the parent of an affiliated group (pursuant to IRC Chapter 6), enter the

> amount of gross dividends paid to the parent by a subsidiary whose gross business profits have already been subject to taxation under RSA 77-A during the same period.

Corporation Business Profits Tax Return, Line-By-Line Instructions, attached to GE's Obj. to DRA's Mot. for Summ. J. and GE's Reply to DRA's Obj. to GE's Mot. for Summ. J. In response to GE's observation, Mr. Gilbert states that "[t]he reference to RSA 77-A:4, IV in the business profits tax form, as it relates to a unitary business is incorrect and the Department is working toward removing that reference." Aff. of Maurice P. Gilbert, Attached to DRA's Reply to GE's Obj. to DRA's Mot. for Summ J. and DRA's Surreply to GE's Reply to the DRA's Obj. to GE's Mot. for Summ. J.

GE's arguments with respect to the directions on the business profit tax form are not sufficient to defeat the fact that GE files its taxes as a unitary business and its foreign-based subsidiaries have not filed separately in New Hampshire so as to be subject to double taxation. The plain and unambiguous language contained in RSA 77-A:4, IV, provides that the purpose of the statute is to prevent double taxation. This statute comes into play when a parent of an affiliated group is entitled to a deduction if its "gross business profits. . . are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation." RSA 77-A:4, IV. GE admits that its foreign subsidiaries have not been subject to taxation in New Hampshire.

Absent a showing that RSA 77-A:4, IV directly and specifically affects its rights, GE does not have standing to bring this lawsuit. "[A] party has standing to raise a constitutional issue only when his own personal rights have been or will be directly or specifically affected." *See Appeal of Richards*, 134 N.H. 148, 154 (.1991). Accordingly, the Court GRANTS DRA's Motion to Dismiss.

However, even assuming *arguendo* that GE has standing to bring this lawsuit, GE fails to demonstrate how RSA 77-A:4, IV is unconstitutional.

GE argues that it is entitled to summary judgment because RSA 77-A:4, IV discriminates on its face against interstate and foreign commerce in violation of the United States Commerce Clause. Further, GE argues that RSA 77-A:4, IV cannot be defended as a valid compensatory tax. DRA counters that GE has not demonstrated that RSA 77-A:4, IV systematically overtaxes foreign corporations or taxes foreign commerce more heavily than domestic commerce. DRA goes on to say that "the circumstances under which the dividend received deduction is allowed is if the dividend is paid by a non-unitary domestic subsidiary conducting business in New Hampshire." *Id.* Further, DRA avers "[i]f the non-unitary dividend-paying subsidiary did not conduct business in New Hampshire, then it would not be subject to tax at all, and of course, the dividend received deduction would not be invoked because the entire statute would be inapplicable, for lack of dividends being subject to tax in the first instance." *Id.* Thus, DRA maintains RSA 77-A:4, IV does "not apply to the factual scenario alleged by GE because the petitioner did not have a subsidiary which filed as a separate entity during the Tax Years, nor did it have a subsidiary subject to . . . double taxation." DRA's Reply to GE's Obj. to DRA's Mot. for Summ. J. at 2. DRA also maintains that even if RSA 77-A:4, IV discriminates against the commerce clause, it is a valid compensatory tax.

RSA 77-A:4, IV, provides:

> In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross busi-

> ness profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

The Commerce Clause of the Federal Constitution provides that "the Congress shall have power to . . . regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. "It has long been understood as well 'to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'" *Caterpillar Inc.*, 144 N.H. at 257 (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 98 (1994)).

> A state tax affecting interstate or foreign commerce violates the Commerce Clause if it: (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State.

Id. (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). "Additionally, a tax affecting foreign commerce must not create an 'enhanced risk of multiple taxation', *id.* (quoting *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979)), or unduly interfere with the Federal Government's ability to 'speak with one voice' in matters of international commerce." *Id.* at 257-58 (quoting *Japan Line Ltd.* 441 U.S. at 449). "The party challenging the constitutionality of a state tax bears the burden of proving discrimination." *Id.* at 258 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). "'In order to prove that a state tax statute violates the commerce clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only

prove discrimination against commerce.'" *Id.* (quoting *Smith v. N.H. Dept of Revenue Admin.*, 141 N.H. 681, 693 (1997)).

GE maintains that while its foreign subsidiaries paid dividends to its parent company in New Hampshire, DRA unlawfully denied its request to deduct those dividends. GE asserts that if its foreign subsidiaries had conducted business in New Hampshire and had filed a separate BPT return, then those foreign subsidiary dividends would have been eligible for the dividend received deduction under RSA 77-A:4, IV. GE argues that the "inextricable link between eligibility for the dividend received deduction and the location and taxability of the payor subsidiary in New Hampshire results in unlawful discrimination under the Commerce Clause." GE's Obj. to DRA's Mot. for Summ. J. at 7.

"When a business operates in more than one jurisdiction, its income must be apportioned among those jurisdictions and each State must determine its share of the income." *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 144 N.H. 253, 255 (1999) (citation omitted). "The Federal Constitution does not impose a particular method upon the States in making this determination." *Id.* "Under the apportionment method, the state considers the income generated by all of the corporation's activities, out-of-state, as well as in-state, and then apportions a share of such income to the taxing state by means of a formula that compares the taxpayer's in-state activities to all of its activities." *Id.* at 256 (quoting Hellerstein, *State Taxation of Corporate Income From Intangibles: Allied Signal and Beyond*, 48 Tax L. Rev. 739, 745 (1993)).

The *Caterpillar* Court described New Hampshire's apportionment method as follows:

> First, the combined net income of the domestic members of the unitary business group is determined (water's edge net income). *See* RSA 77-A:1, XIII, :2-b. Then the three apportionment factors of property, payroll, and sales are

> calculated to determine the percent of the group's net income attributable to the State for taxation. *See* RSA 77-A:3, I. The property factor is determined by dividing the value of the taxpayer's New Hampshire real and personal property (the numerator) by the value of the real and personal property of the water's edge group (the denominator). *See* RSA 77-A:3, 1(a). The payroll and sales factors are similarly calculated. *See* RSA 77-A:3, I(b), (c). The property, payroll, and sales of the foreign members are not considered in calculating the factors. *See* RSA 77-A:1, XV, XVI. The three resulting percentages are averaged by combining them and dividing the total by three. *See* RSA 77-A:3, II(a). This figure is the apportionment percentage, which is multiplied by the water's edge net income, the product of which is the amount of business profits that New Hampshire may tax. *See generally* RSA 77-A: 1 , XVI, :2-b, :3.

Id. at 256-57.

In *Caterpillar Inc., the New Hampshire Supreme Court* rejected a constitutional challenge to RSA 77-A:3, in which the plaintiffs argued that "if the foreign subsidiaries' 'income' is included in the calculation of the total apportionable income, their property, payroll, and sales factors, which generated such income, must also be included."[4] 144 N.H. at 258. The Court concluded that the "nature of the water's edge formula

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[4] The Court opined that:

> [i]n 1986, the legislature adopted the water's edge method, 'eliminating overseas business organizations from subjection to [business profits tax]'. Laws 1986, 153:1, *supra*. Accordingly, while the foreign members' apportionment factors are excluded from the calculation of taxable business profits, their income is exempt from State business profits taxation. Royalty and interest payments by the foreign members to domestic members are included as income of the waters edge group.

Id. at 260 (citation omitted).

requires that foreign subsidiaries be treated differently from domestic subsidiaries: most significantly, the latter's income is subject to taxation while the former's income is not." *Id.* at 261-62. The Court went onto to say that "[a]lthough New Hampshire's unitary apportionment formula may not apportion income perfectly, the Federal Constitution does not require 'mathematical exactitude,' only a 'rough approximation.'" *Id.* at 262 (citing *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940)).

In a similar case to the one presented here, the United States Supreme Court considered whether Iowa's corporate taxing scheme violates the Foreign Commerce Clause. *See Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). The Iowa tax under scrutiny in *Kraft* allowed "a deduction for dividends received from domestic subsidiaries, but not for those received from foreign subsidiaries." *Id.* at 74. The Iowa tax did "not directly tax the income of a subsidiary unless the subsidiary, itself, . . . [did] business in Iowa." *Id.* Further, under this tax, "if a domestic subsidiary transacts business in Iowa, its income is taxed, but if it does not do business in Iowa, neither its income nor the dividends paid to its parent are taxed." *Id.* However, "[i]n the case of the foreign subsidiary doing business abroad, Iowa does not tax the corporate income, but does tax the dividends paid to the parent." *Id.* To avoid multiple taxation, the Iowa tax "allows a deduction for dividends received from a foreign subsidiary if the dividends reflect business activity in the United States." *Id.* at 77. "[W]hile the dividends of all domestic subsidiaries are excluded from the Iowa tax base, the dividends of foreign subsidiaries are excluded only to the extent they reflect domestic earnings." *Id.* The Court rejected Iowa's and *amicus* United States' argument that the Iowa tax scheme was constitutionally valid because unlike a foreign subsidiary, a subsidiary located within the United States would be subject to taxation by the

Federal Government and another State. *See id.* at 80. The Court opined that even though the tax burden to a subsidiary within the United States may be greater than tax burden of a foreign subsidiary, "the fact remains that Iowa imposes a burden on foreign subsidiaries that it does not impose on domestic subsidiaries." *Id.* Notably however, the Court stated that "[i]f one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary." *Id.* at 80, n. 23.

In *E.I. Dupont de Nemours & Co. v. State Tax Assessor*, 675 A.2d 82, 83 (Me. 1996), a unitary taxpayer brought a United States Commerce Clause and Due Process Clause challenge to Maine's tax statute on the basis that it included dividends paid by foreign and unitary sources in calculating the taxpayer's taxable income. In distinguishing Maine's taxing scheme from the Iowa's taxing scheme found unconstitutional in *Kraft*, the Court noted that Maine uses a combined reporting method, while Iowa uses a single entity reporting system. *See id.* at 87. The Court went on to note that:

> [p]ursuant to single entity reporting only the values of a single business's activities within the state are reflected in the taxpayer's tax base. The taxing authority carves out from the taxpayer's overall business those activities taking place in, the property employed in, and the income derived from sources within a single state to determine the income attributable to the state. The various subsidiaries of a multijurisdictional enterprise are viewed as separate from one another and the income of the affiliates that do not do business in the state are not considered in the income of the 'single entity.'

Id., n. 9 (citing Jerome R. Hellerstein & Walter Hellerstein,

State and Local Taxation 432 (4th ed. 1978)). Under Iowa's taxing single entity taxing method, Iowa "directly taxed neither the income nor dividends of a domestic subsidiary if the subsidiary did not do business within the state." *Id.* "Iowa, however, did tax the dividends paid by the foreign subsidiary to the domestic parent." *Id.* Maine's taxing scheme, however, "effectively captures some of the value of the business activity of the domestic subsidiaries by directly taxing an apportioned part of the domestic subsidiary's income." *Id.* "Having captured this value, the Assessor does not add the domestic subsidiary's dividends back into the apportioned income." *Id.* Similar to New Hampshire's water's edge combined reporting method, "Maine's use of the water's edge combined reporting method limits the State to the nation's boundaries in calculating corporate income, and hence no income of foreign subsidiaries is apportioned in Maine." *Id.* In Maine, "[t]he Assessor adds the dividends paid by the foreign subsidiaries to the domestic parent because these dividends represent value earned by the parent that is not otherwise captured." *Id.* at 87-88. The Maine Supreme Court held that "[f]ar from discriminating against foreign commerce, Maine's water's edge combined reporting method provides a type of 'taxing symmetry' that is not present under the single entity system." *Id.* at 88. The Court reasoned that:

> [because the income of the unitary domestic affiliates is included, apportioned, and ultimately directly taxed by Maine as part of the parent company's income, the inclusion of dividends paid by foreign subsidiaries does not constitute the kind of facial discrimination against foreign commerce that caused the Supreme Court to invalidate Iowa's tax scheme in *Kraft*.]

Id.

Unlike Iowa's single entity filing method found to be unconstitutional in Kraft, under New Hampshire' water's edge method, the foreign based dividend is apportioned and added

to the aggregate of the unitary group in New Hampshire, and the unitary group is required to file combined reports as a whole. *See* RSA 77-A:3, I, II, III. Consistent with the reasoning in *E.I. Dupont,* the Court finds here that because GE is a unitary business subject to New Hampshire's water's edge method, and is not subject to taxation under RSA 77:4, IV, GE has failed to demonstrate how RSA 77:4, IV discriminates against foreign commerce.

Additionally, "'[i]n considering claims of discriminatory taxation under the Commerce Clause, it is necessary to compare the taxpayers who are most similarly situated.'" *Caterpillar Inc.*, 144 N.H. at 259 (quoting *Kraft*, 505 U.S. at 80 n.23).[5] In *Kraft*, the Court stated that "[a] corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad." 505 U.S. at 80, n.23. The Court went onto to say that "[i]n the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of a foreign subsidiary." *Id.* "A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa" *Id.* Thus, a New Hampshire corporation that has a subsidiary in New Hampshire is not similarly situated to a New Hampshire corporation with a subsidiary doing business abroad. While the former is subject to taxation in New Hampshire, the latter is not. Under RSA 77-A:4, IV all New Hampshire based and non-New Hampshire based subsidiaries are on equal footing.

Under RSA 77-A:4, IV, New Hampshire based subsidiaries which pay taxes in New Hampshire are entitled to the dividend-received deduction. All non-New Hampshire based sub-

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[5] The Court notes that as per its reference to Chapter 6 of the United States Internal Revenue Code, RSA 77-A:4, IV only applies parent companies that have at least 80 percent of the outstanding stock of a subsidiary.

sidiaries, whether foreign or domestic that have a parent in New Hampshire, and that pay taxes and dividends to the parent are not entitled to the dividend received deduction under RSA 77-A:4, IV. Rather, foreign dividends are apportioned and added to the amount of New Hampshire unitary taxable business profits. RSA 77-A:3, I, II. RSA 77-A:4, IV does not offer a deduction for dividends paid by foreign subsidiaries and does not constitute the kind of facial discrimination at issue in *Kraft*.

For the reason provided above, the Court finds and rules the RSA 77-A:4, IV does not discriminate against foreign commerce and therefore, does not violate the United States Commerce Clause. Accordingly, the Court DENIES GE's Motion for Summary Judgment and GRANTS DRA's Motion for Summary Judgment.

So Ordered.

Dated:_____ _____

EDWARD J. FITZGERALD III,
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS. SUPERIOR COURT

No. 04-E-0305

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ORDER

Before the court is a Motion for Reconsideration, filed by General Electric Company ("GE") pursuant to Superior Court Rule 59-A, requesting that this Court clarify and reconsider its August 18, 2005 Order, in which it granted the New Hampshire Department of Revenue Administration's ("DRA's") Motion to Dismiss. Specifically, GE requests clarification and reconsideration on the following three points: (1) That this Court should reconsider its holding that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV; (2) Whether this Court held that dividends paid by a foreign subsidiary, which does business in New Hampshire and consequently pays Business Profit Tax ("BPT"), would or would not be eligible for the dividends received deductions ("DRDs") under RSA 77-A:4, IV; and (3) That this Court should reconsider its statement that "GE does not dispute. . . that it is not an 'affiliated' business as referenced in the statute." The DRA objects. Upon review of the parties' pleadings and the applicable law, the Court finds and rules as follows.

Procedural History

By way of brief background, the court notes the following relevant facts. GE initiated the instant action in Strafford County Superior Court in 2002, pursuant to RSA 21-J:28-b, IV, seeking to appeal a DRA decision regarding the collection of taxes. GE and the DRA had previously entered into a settlement agreement (the "Agreement") which resolved all disputes arising from the DRA's decision, with the exception of the issue surrounding foreign dividends. Specifically, GE claimed that the allowance of DRDs under RSA 77-A:4, IV, effectively discriminates against foreign commerce, and/or results in double taxation in violation of the Commerce and Due Process Clauses of the United States Constitution. The DRA objected and both parties filed extensive motions.

In an Order dated July 21, 2004, this Court determined that in the interests of judicial economy, the parties should seek an interlocutory transfer of the issue to the Supreme Court for resolution. However, after much effort, the parties were unable to agree on a single interlocutory statement. On April 18, 2005, this Court determined that the Supreme Court was unlikely to accept the appeal, due to the parties' lack of agreement concerning the issue for interlocutory transfer, and instead resolved to respond to the pending motions for dismissal and summary judgment.

On August 18, 2005, upon review of the pending motions, this Court denied GE's motion for summary judgment, as well as its motion to strike the DRA's statutory application argument. The DRA's motions to dismiss and for summary judgment were granted. GE has now filed a motion for reconsideration and clarification of that Order. The Court addresses each of GE's points in turn.

(1) Whether GE Lacks Standing to Bring a Constitutional Challenge Against RSA 77-A:4, IV

GE argues this Court's conclusion that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV, is wrong as a matter of law. In support of this contention, GE argues that (1) GE paid taxes on dividends received from its foreign subsidiaries, and; (2) the DRA denied GE's request for a refund relative to those dividends. As such, GE asserts that it has suffered an injury in fact under an unconstitutional state taxing scheme which allows for DRDs to domestic subsidiaries but not to foreign subsidiaries. Moreover, GE contends that:

> [C]itizens who pay tax have a direct stake in seeing that the Federal Constitution's prohibition against discriminatory taxation is enforced by our courts. If the Court's standing position were correct, then the only citizens who could challenge discriminatory state tax schemes would be those who had benefited from the scheme. Citizens who suffer discriminatory taxation could not mount a legal challenge. Such a holding would turn the Commerce Clause's protection against discriminatory state taxation upside down.

GE's Mot. for Reconsideration and Clarification, Doc. 66, ¶ 14.

Contrary to GE's argument, however, whether a party is benefited from the tax scheme is not the basis for determining standing. Rather, "a party's standing to bring suit is a question of subject matter jurisdiction. . . . The plaintiff[ ] lack[s] standing because [it] cannot raise the constitutional issues of another. The general rule is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected." *Hughes v. N.H. Division of Aeronautics*, 152 N.H. 30, 35 (2005). In this instance, standing is conferred based upon whether the challenged statute is applicable to the way in which GE was taxed.

Here, it is undisputed that GE is a unitary business. As such, GE filed a combined report which was subject to the apportionment method described in RSA 77-A:3. *See* RSA 77-A:3, III ("When 2 or more related business organizations are engaged in a unitary business . . . a part of which is conducted in this state . . . the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II."). RSA 77-A:3, II, prescribes its own method of accounting for foreign dividends from unitary sources.

In contrast, RSA 77-A:4, IV states:

> *In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code* as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

(emphasis added). Chapter 6 of the United States Internal Revenue Code excludes dividends from foreign corporations. *See* 26 U.S.C. § 1504(b)(3). Thus, under the plain and unambiguous language of RSA 77-A:4, IV, it does not apply to a parent company, such as GE in the instant case, which receives dividends from a foreign corporation. Moreover, under the plain and unambiguous language of RSA 77-A:4, IV, its express purpose is to prevent double taxation. In this case, it is undisputed that GE's foreign based subsidiaries did not conduct any business in the state during the tax years at issue and that they have not been subject to taxation in New Hampshire as separate filers. *See GE's Mot. for Summ. J., Doc. 15, p. 6, fn. 8.* Because double taxation did not occur, it follows

that RSA 77-A:4, IV was not invoked. For these reasons, GE, as a unitary group, could not have invoked RSA 77-A:4, IV, and, consequently, lacks standing to challenge its constitutionality. Accordingly, the Court DENIES GE's Motion for Reconsideration on the Issue of Standing.

(2) Whether RSA 77-A:4, IV, is Applicable to a Foreign Subsidiary Doing Business in New Hampshire and Paying BPT

GE requests that this Court clarify its holding as to whether dividends paid by a foreign subsidiary, which does business in New Hampshire and pays BPT, would be eligible for DRDs under RSA 77-A:4, IV. Specifically, GE argues that its' foreign subsidiaries paid dividends but were denied the ability to deduct those dividends by the DRA. GE asserts that if its foreign subsidiaries had conducted business in New Hampshire and had filed a separate BPT return, then those foreign subsidiary dividends would have been eligible for the DRDs under RSA 77-A:4, IV. Thus, according to GE, this prohibition against allowing DRDs to a foreign subsidiary, doing in business in New Hampshire and paying BPT, results in an unconstitutional double taxation scheme. Moreover, GE asserts that any such prohibition against allowing DRDs to foreign subsidiaries, while still allowing DRDs to domestic subsidiaries, would unconstitutionally discriminate against foreign commerce.

At the outset, the Court notes that GE lacks standing to bring a constitutional challenge against RSA 77-A:4, IV, because it is a unitary group which files a combined report and is subject to apportionment under RSA 77-A:3. Moreover, GE has not asserted that it has foreign subsidiaries who did business in New Hampshire and paid BPT, making it unnecessary for this Court to make findings as to whether dividends paid by a foreign subsidiary, doing business in New Hampshire and paying BPT, would be eligible for DRDs under RSA 77-A:4, IV. GE argues that this question is critical to its

argument, however, this Court disagrees. Any challenge to the constitutionality of RSA 77-A:4, IV, would need to be made by a party with standing in this case a foreign subsidiary doing business in New Hampshire and paying BPT under the separate filing regime. Thus, because RSA 77-A:4, IV, is inapplicable to GE's taxing scenario, the Court declines to address its constitutionality at this time. Accordingly, GE's Motion for Clarification is DENIED.

(3) Whether GE Disputes that its Subsidiaries are Affiliated Under the Statute

In this Court's original Order, it stated that "GE does not dispute that it is a 'unitary' business, and, that it is not an 'affiliated' business as referenced in the statute." *General Electric Inc. v. Stanley Arnold, Commissioner of N.H. Dept. of Revenue Administration and N.H. Dept. of Revenue Administration*, Merrimack County Superior Court, No. 04-E-0305, August 18, 2005 (Order, Fitzgerald, J.). GE argues that it has never conceded that its foreign subsidiaries are not "affiliated" under RSA 77-A:4, IV, and that this Court should reconsider that statement. Although this Court found and continues to find that foreign subsidiaries are excluded under the term "affiliated" within RSA 77-A:4, IV, the Court notes that GE did indeed dispute whether its foreign subsidiaries are "affiliated" under the terms of RSA 77-A:4, IV. Accordingly, the Court GRANTS GE's Motion to Reconsider for the limited purpose of reflecting that GE disputes that its foreign subsidiaries are not affiliated under RSA 77-A:4, IV.

So ORDERED.

Dated:_____

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EDWARD J. FITZGERALD III,
Presiding Justice

APPENDIX D

THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS. SUPERIOR COURT

GENERAL ELECTRIC COMPANY, INC.

v.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

APPEAL PURSUANT TO RSA 21-J:28-b, IV

General Electric Company, Inc. ("GE") appeals a decision of the Commissioner of the Department of Revenue Administration pursuant to RSA 21-j:28-b, IV.

PARTIES

1. GE is a corporation organized under the laws of the State of New York with principal executive offices located at 3135 Easton Turnpike, Fairfield, Connecticut.

2. The New Hampshire Department of Revenue Administration (the "Department") is an agency of the State of New Hampshire responsible for overseeing the collection of taxes. Stanley R. Arnold, Jr. is the Commissioner of the Department.

JURISDICTION AND VENUE

3. The Court has jurisdiction to "hear the appeal *de novo*" pursuant to RSA 21-J:28-b, IV.

4. GE has a place of business in Somersworth, County of Strafford, State of New Hampshire, and venue therefore is properly laid in this court pursuant to RSA 21-J:28-b, IV.

PROCEDURAL BACKGROUND ON THE DEPARTMENT'S ACTIONS

5. The tax years at issue in this appeal are 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, and 1999 ("the Tax Years").

6. GE filed business profits tax ("BPT") returns for each of the Tax Years ("GE's BPT Returns"), and the Department conducted an examination of GE's BPT Returns.

7. On September 5, 2001, GE and the Department executed two settlement agreements substantially resolving GE's BPT liability for the Tax Years as described in two agreements (the "Settlement Agreements") attached to this petition. The Settlement Agreement for the tax years 1987 to 1995 is attached at Exhibit A and the Settlement Agreement for the tax years 1996 to 1999 is attached at Exhibit B.

8. The Settlement Agreements resolved all disputes arising from the examination, except two issues: the "Penalty Issue" and the "Foreign Dividend Issue." The sole issue presented in this appeal is the "Foreign Dividend Issue."

9. The Foreign Dividend Issue is whether the dividends received deduction allowed under RSA 77-A:4, IV should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution and results in unfair taxation out of all proportion to the activities carried on by GE in New Hampshire in violation of the Due Process and Commerce Clauses of the United States Constitution.

10. RSA 77-A:4, IV (the "Dividends Received Deduction") generally permits a parent corporation to deduct dividends received from a subsidiary company that conducts business within New Hampshire and that accordingly files a BPT return. RSA 77-A:4 does not allow any deduction for dividends received from a subsidiary company that does not

conduct business within New Hampshire and does not file a BPT return. RSA 77-A:4, IV.

11. As set forth in more detail below, the Foreign Dividend Issue exists and applies to GE in each of the Tax Years. Pursuant to the Settlement Agreements, the parties have agreed and stipulated that GE timely filed all returns, requests for refunds, and petitions for redetermination and reconsideration requesting the Department to, among other things, determine the Foreign Dividend Issue in GE's favor and calculate GE's BPT liability in accordance with such determination. Pursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738.

12. On June 24, 2002, the Department's Hearing Officer issued an order that consolidated numerous existing administrative dockets affecting the Tax Years in order to address the Foreign Dividend Issue for the Tax Years in one administrative docket.

13. Additionally, on June 24, 2002, the Hearing Officer granted a joint motion of GE and the Department waiving formal adjudication by the Hearing Officer of the Foreign Dividend Issue for the Tax Years contained in the consolidated administrative docket because the Hearing Officer is not empowered to decide whether a New Hampshire statute violates provisions of the New Hampshire Constitution or the United States Constitution.

14. The Hearing Officer's "Final Order," transmitted to GE by certified mail in a letter dated June 25, 2002, indicated that "the only legal issue presented involves the constitutionality of RSA 77-A:4, IV, and as the Department's Hearing Officer, I am not empowered to decide whether a statute violates the New Hampshire Constitution or the United States

Constitution." Therefore, the Hearing Officer's final order indicated that:

1. The relief requested by General Electric regarding the Foreign Dividend Issue for each of the 1990-1999 Tax Years is denied because the Hearing Officer is not empowered to decide whether RSA 77-A:4, IV violates the United States Constitution. This denial is issued without prejudice to the rights of General Electric to present the Foreign Dividend Issue to the Superior Court for determination whether RSA 77-A:4, IV violates the United States Constitution and whether General Electric is entitled to a refund.

2. As provided in RSA 21-J:28-b, IV, General Electric may appeal this order within 30 days to the Board of Tax and Land Appeals or the Superior Court. If General Electric does not take an appeal within the time required by statute, the denial of relief shall become final.

15. The Hearing Officer's "Final Order" denies the relief requested by GE regarding the Foreign Dividend Issue with respect to the Tax Years.

FACTS CONCERNING THE DEPARTMENT'S ERRONEOUS AND UNCONSTITUTIONAL TREATMENT OF THE FOREIGN DIVIDEND ISSUE

16. During the Tax Years, GE was the parent company of a group of companies that operated various businesses both within and without the United States.

17. During the Tax Years, GE conducted portions of its businesses in foreign (non-United States) markets through certain subsidiaries that did not carry on any business within New Hampshire or any other part of the United States (the "GE Foreign Subsidiaries").

18. The BPT Statute generally requires a taxpayer to determine its BPT liability based on the "combined net income" of those business organizations that are engaged in the conduct of a unitary business, except for "overseas business organizations." RSA 77-A:2-b; RSA 77-A:1, XV. The BPT Statute defines "overseas business organizations" ("OBOs") as "business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia." RSA 77-A:1, XIX. The exclusion of OBOs creates a group of domestic (United States) business organizations which is referred to in the BPT Statute as a "water's edge combined group." RSA 77-A:1, XV. An OBO that carries on any business activity within New Hampshire is taxable as an entity separate from the other organizations with which it is engaged in a unitary business and must file a separate BPT return. RSA 77-A:1, I.

19. For each of the Tax Years, GE filed BPT returns reflecting the combined net income of those business organizations comprising its "water's edge combined group." These returns excluded the income of the GE Foreign Subsidiaries.

20. For each of the Tax Years, the GE Foreign Subsidiaries were not required to file a separate BPT return because they were not carrying on business within New Hampshire.

21. During the Tax Years, the GE Foreign Subsidiaries paid substantial dividends to their domestic (United States) parent corporations that were members of the GE water's edge combined group.

22. In denying GE's petitions for redetermination and reconsideration, the Department rejected GE's claim that it was entitled to deduct the amount of such foreign dividends in computing GE's combined net income for purposes of the BPT Statute.

BASES FOR APPEAL

COUNT ONE

The Department's Rejection of GE's Claim is Erroneous Because the Dividends Received Deduction of the New Hampshire Business Profits Tax Statute Facially Discriminates Against Foreign Commerce in Violation of the Commerce Clause of the United States Constitution.

23. GE incorporates by reference paragraphs 1 through 22 as if fully set forth herein.

24. Under the BPT Statute, whether GE is allowed to deduct dividends paid by a GE Foreign Subsidiary depends solely on whether the GE Foreign Subsidiary carries on business activity within New Hampshire. If it does, then it is required to file a separate BPT return, and GE is permitted to deduct the dividends under RSA 77-A:4, IV. If it does not, then it is not required to file a separate BPT return, and GE is not permitted to deduct the dividends.

25. Accordingly, RSA 77-A:4, IV establishes a regime that allows preferential deduction treatment of foreign dividends paid by foreign subsidiaries only to the extent that the foreign subsidiaries carry on business activity within New Hampshire.

26. This Dividends Received Deduction regime draws an express facial statutory distinction between a business with foreign subsidiaries that carry on business activity within New Hampshire and a business with foreign subsidiaries that do not carry on business activity within New Hampshire.

27. The Business Profits Tax Statute, through its Dividends Received Deduction, favors businesses that locate some property and business activity of foreign unitary subsidiaries in New Hampshire over businesses that do not locate property and business activity of foreign unitary subsidiaries in New Hampshire.

28. During the Tax Years, GE's Foreign Subsidiaries did not have any property or business activities located within New Hampshire, and accordingly GE was denied the right to receive non-discriminatory application of the Dividends Received Deduction with respect to dividends paid by the GE Foreign Subsidiaries.

29. The BPT Statute therefore facially discriminates against foreign commerce in violation of the Commerce Clause of the United States Constitution. *See Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996)(invalidating North Carolina's intangibles tax deduction based on the extent to which a corporation conducted business within North Carolina); *NCR Corp. v. Wisconsin Dep't of Rev.*, Wisc. Cis. Ct., Dane County, No. 92 CV 1525 (1993)(invalidating Wisconsin's "concentration statute" deduction for dividends received from subsidiaries with at least 50% of their net income from Wisconsin); *Ceridian Corp. v. Franchise Tax Bd.*, No. A084298 (December 21, 2000)(California's deduction for dividends received by commercially domiciled parents from insurance subsidiaries subject to the California insurance premiums tax unlawfully discriminates against interstate commerce); *Farmer Bros. Co. v. Franchise Tax Bd.*, No. BC237663 (Superior Court of California, County of Los Angeles November 21, 2001)(California's general dividends received deduction unlawfully discriminates against interstate commerce); *DDI, Inc. v. State of North Dakota*, No. 08-01-C-2879 (South Central Judicial District Court of North Dakota, County of Burleigh June 6, 2002)(North Dakota's dividends received deduction unlawfully discriminates against interstate commerce).

30. The Foreign Dividend Issue presents an issue of fundamental importance to the nation's economy and the fair and consistent application of state tax laws to global commerce.

31. Because the BPT Statute's Dividends Received Deduction unlawfully discriminates against foreign commerce, it

violates the Foreign Commerce Clause of the United States Constitution, and the Department's assessments of tax with respect to payments of dividends by GE's Foreign Subsidiaries should be rejected.

32. Wherefore, GE respectfully requests this Court declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

COUNT TWO

The Department's Rejection of GE's Claim is Erroneous Because the Dividends Received Deduction of the New Hampshire Business Profits Tax Statute As Applied Discriminates against Foreign Commerce in Violation of the Commerce Clause of the United States Constitution.

33. GE incorporates by reference paragraphs 1 through 32 as if fully set forth herein.

34. In addition to the facial discrimination alleged in Count One, the Dividends Received Deduction, as applied to GE, the GE Foreign Subsidiaries and the dividends paid by the GE Foreign Subsidiaries, discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution.

35. Wherefore, GE respectfully requests this Court declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the Foreign Commerce Clause of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

COUNT THREE

The Department's Rejection of GE's Claim is Erroneous Because the Taxation of the Dividends Paid By GE's Foreign Subsidiaries Results in Grossly Distorted and Unfair Taxation in Violation of the Due Process and Commerce Clauses of the United States Constitution.

36. GE incorporates by reference paragraphs 1 through 32 as if fully set forth herein.

37. The dividends paid by the GE Foreign Subsidiaries are derived solely from activities conducted outside of New Hampshire.

38. Taxation of such dividends pursuant to the BPT Statute results in the grossly unfair and distorted overstatement of GE's income that is out of proportion to its business activities within New Hampshire.

39. Wherefore, GE respectfully requests this Court declare that taxation of the foreign dividends paid by the GE Foreign Subsidiaries pursuant to the BPT Statute results in grossly distorted and unfair taxation in violation of the Due Process and Commerce Clauses of the United States Constitution, and order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries.

RELIEF REQUESTED BY PETITIONER

WHEREFORE, GE respectfully requests that the Court enter judgment in GE's favor and:

(a) Reverse the Commissioner's denial of GE's claim for relief;

(b) Grant the relief requested in this petition;

(c) Declare that RSA 77-A:4, IV unlawfully discriminates against foreign commerce in violation of the

Foreign Commerce Clause of the United States Constitution;

(d) Declare that RSA 77-A:4, IV results in grossly distorted and unfair taxation in violation of the Due Process and Commerce Clauses of the United States Constitution;

(e) Order the Department to pay the required and stipulated refund of taxes attributable to the unlawful taxation of dividends paid by the GE Foreign Subsidiaries; and

(f) Grant GE such other and further relief as may be appropriate.

Respectfully submitted,

GENERAL ELECTRIC COMPANY, INC.

By Their Attorneys,

RATH, YOUNG AND PIGNATELLI,
Profession. Association

Dated: July 23, 2002

By:_____

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[Exhibits omitted.]

APPENDIX E

THE STATE OF NEW HAMPSHIRE
STAFFORD, SS. SUPERIOR COURT

Docket No. 02-E-141

GENERAL ELECTRIC COMPANY, INC.

V.

STANLEY R. ARNOLD, COMMISSIONER OF NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION AND NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION

ANSWER

NOW COMES the State of New Hampshire, on behalf of the New Hampshire Department of Revenue Administration, and the Commissioner of the New Hampshire Department of Revenue Administration (collectively referred to as "the Department"), through counsel, the Office of the Attorney General, and submits this answer:

1. Admitted.

2. Admitted to the extent that the paragraph describes the responsibilities of the Department. By way of further clarification, the Respondent states that Barbara T. Reid is currently the Acting Commissioner of the Department.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7 Admitted.

8. Admitted.

9. Admitted insofar as the paragraph characterizes the case as involving the issue of the constitutionality of the dividends received deduction allowed under RSA 77-A:4, IV. Paragraph 9 is denied to the extent that it contains legal conclusions.

10. Paragraph 10 contains legal conclusions that require no response and is therefore denied. By way of further answer, the Respondent states that the deduction is not based on the amount of business conducted in the state; it is based on the amount of the dividends paid by the subsidiary that have already been subject to business profits tax. RSA 77-A:4, IV; *First Fin. Group of New Hampshire, Inc. v. State*, 121 N.H. 381, 384-85 (1981).

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. The Department lacks sufficient information to form a belief as to the truth of the allegations of paragraph 17, therefore, they are denied.

18. Paragraph 18 contains legal conclusions that require no response and is therefore denied.

19. Admitted.

20. Paragraph 20 is denied to the extent that it contains legal conclusions suggesting that absence of activity sufficient to carry on business in the State is the only reason a subsidiary would not be required to file business profits tax returns in New Hampshire.

21. Admitted to the extent that GE foreign subsidiaries paid dividends to members of GE's water's edge combined group; denied as to the characterization or relevance of "substantial."

22. Admitted.

23. Paragraph 23 requires no response.

24. Paragraph 24 contains legal argument and conclusions that require no response and is therefore denied.

25. Paragraph 25 contains legal argument and conclusions that requite no response and is therefore denied.

26. Paragraph 26 contains legal argument and conclusions that require no response and is therefore denied.

27. Paragraph 27 contains legal argument and conclusions that require no response and is therefore denied.

28. Paragraph 28 contains legal argument and conclusions and requires no response and is therefore denied.

29. Paragraph 29 contains legal argument and conclusions that require no response and is therefore denied.

30. Paragraph 30 contains legal argument and conclusions that require no response and is therefore denied.

31. Paragraph 31 contains legal argument and conclusions that require no response and is therefore denied.

32. Paragraph 32 contains a prayer for relief that requires no response.

33. Paragraph 33 requires no response.

34. Paragraph 34 is denied. By way of further answer, the Respondent states that it has no knowledge of facts, which would make the dividends received deduction, as applied to GE, unconstitutional, in violation of the Foreign Commerce Clause of the United States Constitution.

35. Paragraph 35 contains a prayer for relief that requires no response.

36. Paragraph 36 requires no response.

37. The Department lacks sufficient information to form a belief as to the truth of the allegations of paragraph 37, therefore, they are denied.

38. Paragraph 38 contains legal argument and conclusions that require no response and is therefore denied.

39. Paragraph 39 contains a prayer for relief that requires no response.

40. Except as expressly admitted above, the Department denies each and every allegation in the Petition.

AND IN FURTHER ANSWER and by way of affirmative defenses, the Department says as follows:

FIRST DEFENSE

The Petition fails to state facts upon which relief could be granted.

SECOND DEFENSE

The Department reserves the right to amend this Answer and statement of Affirmative Defenses.

WHEREFORE, the Department respectfully requests that this honorable Court:

A. Enter an Order affirming the determination of the Commissioner; and

B. Grant such further relief as may be just and equitable.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE DEPT. OF REVENUE ADMINISTRATION

By Their Attorneys,

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL

KAREN A. SCHLITZER
Attorney
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Certification

I certify that a copy of the foregoing was mailed this day, first class postage prepaid, to Christopher J. Sullivan, Esq., Rath, Young and Pignatelli, One Capital Plaza, Post Office Box 1500, Concord, NH 03302-1500.

October 30, 2002 ---

KAREN A. SCHLITZER

APPENDIX F

Statutory Provisions*

N.H. R.S.A 77-A:1 Definitions. When appearing in this chapter:

I. "Business organization" means any enterprise, whether corporation, partnership, limited liability company, proprietorship, association, business trust, real estate trust or other form of organization; organized for gain or profit, carrying on any business activity within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code as defined in RSA 77-A: 1, XX. Each enterprise under this definition shall be subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this chapter to be treated otherwise, such as, but not limited to, combined reporting. Trusts treated as grantor trusts under section 671 of the United States Internal Revenue Code shall be included in the return of their owners, and such owners shall be subject to the tax thereon to the extent such owners would be considered a business organization hereunder notwithstanding the existence of the trust. The use of consolidated returns as defined in the United States Internal Revenue Code as defined in RSA 77-A:1, XX is not permitted. Notwithstanding any other provision of this paragraph, an enterprise shall not be characterized as business organization and shall be excluded from taxation at the entity level if it elects to be treated as a qualified investment company as defined in RSA 77-A:1, XXI. A partnership, limited liability company, estate, trust except grantor trusts pursuant to section 671 of the United States Internal Revenue Code, "S" corporation, real estate

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* The statutes as reproduced below reflect New Hampshire's current law. These statutory provisions do not differ in any material respect from the statutory provisions that were in force during the tax years at issue (1990-99). However, the statutes have been amended from time to time over the past sixteen years.

investment trust, or any other such entity, other than an organization electing to be treated as a qualified investment company as defined in RSA 77-A:1, XXI whose net income is reportable by the true owners either directly or indirectly shall be subject to tax at the entity level, and no part of such earnings or loss shall be included in the calculation of the gross business profits of the owners of such entity.

* * * *

XIV. "Unitary business" means one or more related business organizations engaged in business activity both within and without this state among which there exists a unity of ownership, operation, and use; or an interdependence in their functions.

XV. "Water's edge combined group" means a group of business organizations as defined in RSA 77-A:1, I operating a unitary business, except for overseas business organizations, as defined in paragraph XIX; provided, however, overseas business organizations shall only be excluded from the definition of "water's edge combined group" if the following criteria are met:

(a) The taxpayer certifies that transactions conducted between such business organizations and other members of the group are on a comparable basis to transactions between other business organizations owned or controlled by the taxpayer and any members of the water's edge combined group; and

(b) The taxpayer agrees to report to the commissioner any adjustments as finally determined by the United States Internal Revenue Service with respect to such transactions between any related business organizations as may have a bearing on the comparability of transactions referred to in subparagraph (a). These adjustments shall be made to the 80/20 business organizations so that a comparable basis shall be maintained for New Hamp-

shire tax purposes. Such report shall be made in the manner and within the time limits as provided in RSA 77-A:10. Nothing in this paragraph shall exclude from taxation any business organization carrying on business activity within the state.

XVI. "Water's edge method" means the determination of taxable business profits for a group of business organizations conducting a unitary business by adding their combined net income, the additions and deductions provided in RSA 77-A:4 for members of the group, and apportioning the result as provided in RSA 77-A:3.

* * * *

XIX. "Overseas business organizations" means business organizations with 80 percent or more of the average of their payroll and property assignable to a location outside the 50 states and the District of Columbia.

* * * *

N.H. R.S.A 77-A:2 Imposition of Tax. A tax is imposed at the rate of 8.5 percent upon the taxable business profits of every business organization.

N.H. R.S.A. 77-A:3 Apportionment.

I. A business organization which derives gross business profits from business activity both within and without this state, and which is subject to a net income tax, a franchise tax measured by net income, or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a net income tax or capital stock tax upon it, whether or not such tax is actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as provided in this section, such apportionment shall be made on the basis of the following 3 factors:

(a) The percentage of value of the total real and tangible personal property owned, rented and employed by

the business organization everywhere as is owned, rented and employed by it in the operation of its business in this state. Property owned by the business organization shall be valued at its original cost. Property rented by the business organization shall be valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the business organization less any annual rental rate received by the business organization from subrentals.

(b) The percentage of total compensation paid by the business organization to employees everywhere as is paid by the business organization to employees for services rendered within this state. Such compensation is deemed to be disbursed for services in this state if the service is performed entirely within this state, or if the service is performed both within and without this state and the service performed without this state is incidental to the service within this state, or some of the service is performed in this state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual performing such service resides within this state.

(c) The percentage of the total sales, including charges for services, made by the business organization everywhere as is made by it within this state. Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of f.o.b. point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and (1) the purchaser is the United States government, or (2) the business organiza-

tion is not taxable in the state of the purchaser. Sales other than sales of tangible personal property are in this state if the income-producing activity is performed in this state, or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

II. (a) A fraction, the numerator of which shall be the property factor in subparagraph I(a) plus the compensation factor in subparagraph I(b) plus 2 multiplied by the sales factor in subparagraph I(c) and the denominator of which is 4, shall be applied to the total gross business profits (less foreign dividends) of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly represent the business organization's business activity in this state, the business organization may petition for, or the commissioner may require, in respect to all or any part of the business organization's business activity, if reasonable:

(1) The exclusion of any one or more of the apportionment factors;

(2) The inclusion of one or more additional apportionment factors which will fairly represent the business organization's business activity in the state; or

(3) The employment of any other method to effect an equitable apportionment of the business organization's gross business profits.

(b) For foreign dividends from unitary sources, the following formula shall be used to modify factors relating to included dividends:

(1) Determine a percentage for each dividend payor consisting of dividends paid divided by taxable income which has been computed using United States standards.

(2) Apply this percentage to the dividend payor's foreign property, payroll, and sales.

(3) Sum the results in subparagraph (2) for all dividend payors.

(4) Add the result in subparagraph (3) to the denominators of the combined water's edge group. The numerator will remain the New Hampshire numerator.

(5) Apply the resulting percentage to the foreign dividends.

(6) Add this amount to the amount of New Hampshire taxable business profits computed pursuant to RSA 77-A:3, I and II(a).

III. When 2 or more related business organizations are engaged in a unitary business, as defined in RSA 77-A:1, XIV, a part of which is conducted in this state by one or more members of the group, the income attributable to this state shall be determined by means of the combined apportionment factors of the unitary business group in accordance with paragraphs I and II.

IV. The business organization is entitled to a hearing by the commissioner on request in connection with any change in its apportionment procedure and has the right of appeal from the commissioner's determination as provided in RSA 21-J:28-b.

N.H. R.S.A. 77-A:4 Additions and Deductions. The following adjustments shall be made to gross business profits in determining taxable business profits:

* * * *

IV. In the case of a corporation which is the parent of an affiliated group pursuant to the provisions of chapter 6 of the United States Internal Revenue Code as defined in RSA 77-A:1, XX, a deduction of such amounts of gross business

profits as are derived from dividends paid to the parent by a subsidiary or subsidiaries whose gross business profits have already been subject to taxation under this chapter during the same taxable period. The purpose of this deduction is to prevent double taxation on the identical gross business profits of a controlled corporation or group of corporations and its parents.

* * * *

N.H. R.S.A 77-A:6 Returns, Declarations, and Combined Reporting.

I. Every business organization having gross business income in excess of $50,000 as defined by RSA 77-A:1, VI, during the taxable period, shall on or before the fifteenth day of the third month in the case of organizations required to file a United States corporation tax return, and the fifteenth day of the fourth month in the case of all other business organizations, following expiration of its taxable period, make a return to the commissioner. The commissioner of revenue administration shall adopt rules, pursuant to RSA 541-A, relative to the form of such return and the data which it must contain for the correct computation of taxable business profits and gross business income attributable to this state and the tax assessed on it. All returns shall be signed by the taxpayer or by its authorized representative, subject to the pains and penalties of perjury.

* * * *

IV. A business organization which is part of a water's edge combined group and required to report under this chapter shall file a return containing the combined net income of the water's edge combined group and such other informational returns as the commissioner shall require by rules adopted under RSA 541-A. The commissioner is authorized to impose the tax as though the entire combined net income of the water's edge combined group was that of one business or-

ganization or the commissioner may adjust the tax or income in such other manner as the commissioner shall determine to be equitable if the commissioner determines it to be necessary in order to clearly reflect the net income earned by such organization from business done in this state. This provision shall not authorize the application of worldwide combined reporting except as provided in RSA 77-A:2-b, II.